TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 124

EDWARD LEON WILLIAMS, PETITIONER,

vs.

THE STATE OF OKLAHOMA

ON WRIT OF CERTIORARI TO THE CRIMINAL COURT OF APPEALS OF THE STATE OF OKLAHOMA

PETITION FOR CERTIORARI FILED MAY 22, 1958

CERTIORARI GRANTED JUNE 23, 1958

SUPREME COURT OF THE UNITED STATES

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INDEX

[fol. a] [File endorsement omitted]

IN THE CRIMINAL COURT OF APPEALS OF THE STATE OF OKLAHOMA

A-12,467

EDWARD LEON WILLIAMS, Plaintiff-in-error

vs.

STATE OF OKLAHOMA, Defendant-in-error.

PETITION-IN-ERROR—Filed April 13, 1957

Comes Now the plaintiff-in-error, Edward Leon Williams, and complains of the defendant-in-error, the State of Oklahoma, and states that he entered a plea of "Guilty" in the District Court of Tulsa County, Oklahoma, to the charge of kidnapping, Case No. 16911, on January 30, 1957, and that subsequently, on February 1, 1957, it was the judgment and sentence of the Court that he suffer death at the State Penitentiary at McAlester, Oklahoma. The original Case made, duly signed, attested and filed, is hereto attached, marked "Exhibit A", and made a part of this petition-in-error.

The plaintiff-in-error avers that there is error in the said record and proceedings as follows, to-wit:

(1) That the Court erred in its judgment and sentence of death to the charge of kidnapping in Case No. 16911.

(2) That the Court erred in overruling plaintiff-in-error's motion for a new trial in said Case No. 16911.

[fol. b] (3) That the trial court erred in overruling plaintiff-in-error's motion to withdraw his plea of "Guilty" in said Case No. 16911. For among other reasons, the following:

a. That at no time was competent evidence in aggravation of the offense introduced, and the unsworn remarks made at the hearing preceding the imposition of said sentence by the County Attorney in aggravation of said offense were incompetent, irrelevant, immaterial, and were prejudicial to this plaintiff-in-error.

b. That the plaintiff-in-error had received no notice of the presentation of any matters in aggravation, and the presentation of such constitutes surprise and failure to apprize the plaintiff-in-error of the matters in aggravation that he must meet.

c. That news media and public clamor influenced and prejudiced the Court and its officers and thereby affected the sentence to the prejudice of plaintiff-in-error.

d. That the extent of punishment received on this charge is actually punishment for the separate crime of murder in Muskogee County, and a part of the same transaction, and for which plaintiff-in-error had been previously convicted and sentenced and has thereby in practical effect been twice put in jeopardy of life and liberty and has been twice punished for the same offense. That each and all of the above grounds constitute prejudicial error.

Wherefore, plaintiff-in-error prays that said judgment [fol. c] and sentence so rendered by the trial court be modified and reduced in accordance with and by virtue of the errors complained of herein, and for such other relief as the court may in good conscience deem just and proper.

John A. Ladner, Jr., Fred W. Woodson, Attorneys for Plaintiff in error.

[fols. 1-3] **Exhibit A to Petition in Error**—Filed April 13, 1957

IN THE DISTRICT COURT OF TULSA COUNTY, OKLAHOMA

Robbery with Firearms. No. 16910

THE STATE OF OKLAHOMA

vs.

EDWARD LEON WILLIAMS, defendant

and

Kidnapping. No. 16911

THE STATE OF OKLAHOMA

vs.

EDWARD LEON WILLIAMS, defendant

* * * * * * *

CAPTION

Be It Remembered that these cases were commenced in the District Court of Tulsa County, Oklahoma, on the 14th day of December, 1956 by the filing of Transcripts in said cases, which are in words and figures as follows:

[fol. 4-16] IN THE DISTRICT COURT OF TULSA COUNTY, OKLAHOMA

THE STATE OF OKLAHOMA,
County of Tulsa, ss:

No. 16911

THE STATE OF OKLAHOMA, plaintiff,

vs.

EDWARD LEON WILLIAMS, defendant.

INFORMATION FOR KIDNAPPING—Filed December 17, 1956

Be It Remembered:

That J. Howard Edmondson, the duly qualified and acting County Attorney for Tulsa County, Oklahoma, who prosecutes in the name and by the authority of the State of

Oklahoma, comes now into the District Court of Tulsa County, State of Oklahoma, on this the 17th day of December, A. D. 1956, and gives the Court to understand and be informed that Edward Leon Williams on the 17th day of June, 1956, in Tulsa County, State of Oklahoma, and within the jurisdiction of this Court, did unlawfully, wilfully, forcibly and feloniously, kidnap one Tommy Robert Cooke [fol. 17] by then there unlawfully, wilfully, forcibly and feloniously, seizing and confining the said Tommy Robert Cooke, with the unlawful and felonious intent then and there upon the part of said defendant to cause the said Tommy Robert Cooke to be secretly confined and imprisoned at a point in Tulsa County, State of Oklahoma, unknown to this affiant, and against the will of the said Tommy Robert Cooke, for the purpose of extorting a thing of value and an advantage from the said Tommy Robert Cooke, contrary to the form of the Statutes in such cases made and provided, and against the peace and dignity of the State.

J. Howard Edmondson, County Attorney.

[File endorsement omitted.]

[fol. 18] In District Court of Tulsa County, Oklahoma

No. 16911

[Title omitted]

Journal Entry—December 19, 1956

State represented by Edmondson, defendant present in open court, not represented by counsel. Court assigns Fred Woodson, public defender. Information read to the defendant. Defendant waives further time to plead enters his plea of not guilty. Case set for trial 2-4-57. Defendant reserves the right to further plead. Defendant to be held without bond.

Lewis C. Johnson, Judge.

[fol. 19] IN DISTRICT COURT OF TULSA COUNTY, OKLAHOMA

No. 16911

[Title omitted]

JOURNAL ENTRY—January 30, 1957

State represented by county attorney J. Howard Edmondson. Defendant in court with his counsel Fred Woodson, public defender. With the consent of his counsel, the defendant withdraws former plea of not guilty and enters a plea of guilty. Reporter Garn Gordon. Statements made. The court accepts the plea of guilty and finds the defendant guilty as charged. Sentenced passed to the custody of the sheriff.

Leslie Webb, Judge.

[fol. 20] IN DISTRICT COURT OF TULSA COUNTY, OKLAHOMA

No. 16911

[Title omitted]

JOURNAL ENTRY—February 1, 1957

State represented by J. Howard Edmondson. Defendant in court with his counsel, Fred Woodson, public defender, Defendant having heretofore been found guilty by the court upon his plea of guilty and this day being set for judgment and sentence and no legal cause appearing to the court why judgment and sentence should not be pronounced at this time, defendant is adjudged guilty of the crime of Kidnapping and sentenced to death as provided by the laws of the State of Oklahoma and the warden is ordered to carry out the judgment and sentence of the court on the 25th day of April, 1957. Defendant is remanded to the custody of the sheriff for transportation to McAlester, Oklahoma forthwith and within 10 days. Defendant excepts. Exceptions allowed. Defendant gives notice of intention to appeal in open court and asks that same be noted on the proper docket. It is so ordered. 60 days allowed to prepare and serve casemade, 10 days to suggest amendments thereto and same to

be settled within 5 days upon notice in writing to either party.

Leslie Webb, Judge.

[fol. 21] IN THE DISTRICT COURT OF TULSA COUNTY, OKLAHOMA

No. 16,910

THE STATE OF OKLAHOMA, plaintiff,

vs.

EDWARD LEON WILLIAMS, defendant

and

No. 16,911

THE STATE OF OKLAHOMA, plaintiff,

vs.

EDWARD LEON WILLIAMS, defendant

Before Honorable Leslie Webb, Judge.

APPEARANCES:

For the State—J. Howard Edmondson, Co. Atty., Robert Simms, assistant.

For the Defendant—Fred Woodson, public defender.

REPORTER'S TRANSCRIPT OF THE PROCEEDINGS—January 30, 1957

Garn Gordon, Reporter.

[fol. 22] The Court: You may proceed.

DEFENDANT ENTERS PLEA OF GUILTY

Mr. Woodson: The defendant desires to withdraw his plea of not guilty and enter a plea of guilty.

The Court: You are Edward Leon Williams?

Mr. Williams: Yes, sir.

The Court: That is your true and correct name?

Mr. Williams: Yes, sir.

The Court: You have heretofore been arraigned in this Court in case 16,910 upon the charge of Robbery with Fire-

arms, as set forth in the Information which is filed in this Court?

Mr. Williams: Yes, sir.

The Court: Upon your arraignment, and your plea of not guilty, the case has been regularly and duly set upon the trial docket, for trial by a jury, but the Court is advised that—by the County Attorney's office and also by your counsel, the public defender, that you wish to withdraw your plea of not guilty which you heretofore entered, and at this time enter a plea of guilty. Is the Court correctly advised?

Mr. Williams: Yes, sir.

The Court: You wish to plead guilty to the charge of Robbery with Firearms?

Mr. Williams: Yes, sir.

[fol. 23] The Court: As set forth in the Information. You enter this plea voluntarily?

Mr. Williams: That's right.

The Court: And being fully advised of your rights, that is right, is it?

Mr. Williams: Yes, sir.

The Court: And after having advice of counsel and consultation with counsel, you are entering this plea, that is true, is it?

Mr. Williams: Yes, sir.

The Court: Very well. Upon your plea of guilty to the charge of Robbery with Firearms, as entered at this time, the Court finds you guilty. Do you have any legal cause to assign, why the Court should not pass and impose sentence upon you?

Mr. Williams: No, sir.

The Court: Now, under the law, you are entitled to have the case passed for at least two days before formal sentencing and unless you request sentence will not be passed at this time. The Court will set formal sentencing under your plea at a later date.

Mr. Woodson: Your Honor, we waive the formality to pass it to another time.

The Court: You request that sentence be passed at this time, do you?

[fol. 24] Mr. Williams: Yes, sir.

The Court: All right. The record will so show. Do you have any statement to make, or any legal cause to assign

why the Court should not pass and impose sentence upon you at this time?

Mr. Williams: No, sir.

The Court: Now, you realize that upon your plea of guilty, it becomes the duty of the Court to pass sentence upon you, and that you stand before the bar of this Court, charged with an offense that is punishable by the maximum punishment of death in the electric chair. You realize that, do you?

Mr. Williams: Yes, sir.

The Court: Before you entered a plea of guilty to this charge, was there any representations made to you by counsel, or otherwise, as to the nature of the sentence, that you could expect to receive in this case?

Mr. Williams: I was told I could expect the maximum.

The Court: You were told that you could expect the maximum?

Mr. Williams: That was possible.

The Court: That is, of death in the electric chair?

Mr. Williams: Yes.

The Court: And in light of that, you are entering [fol. 25] your plea?

Mr. Williams: Yes, sir.

The Court: Who advised you of that?

Mr. Williams: Counsel.

The Court: Do you have any statement or record you wish to make in this case?

Mr. Simms: We have, your Honor. However, we would like to dispose of both these cases at one time by statement.

The Court: All right.

Mr. Simms: We can make one statement covering both of these cases.

The Court: All right. Before I pass sentence in case 16,910, I will take a plea in case 16911.

Mr. Simms: Yes, sir.

The Court: Now, the Court is also advised that in case 16,911, wherein you, Edward Leon Williams, are charged with the crime and offense of Kidnapping, in which case you have heretofore entered a plea of not guilty upon arraignment, and in which case the matter has been set down upon the jury docket for trial and during the February docket. As I said, the Court is advised by the assistant County Attorney and also by your counsel, that at this time you

wish to withdraw your plea of not guilty, which has heretofore been entered in this case, wherein you are charged with [fol. 26] the crime of kidnapping, and enter a plea of guilty to this charge——

Mr. Williams: Yes, sir.

The Court: —is that correct?

Mr. Williams: Yes, sir.

The Court: Now, you understand the nature of this charge, do you?

Mr. Williams: That's right.

The Court: You understand, that it is a charge that is punishable with the extreme penalty of life imprisonment, or death in the electric chair?

Mr. Williams: Yes, sir.

The Court: In light of that knowledge and information and understanding, are you entering this plea freely and voluntarily upon your part?

Mr. Williams: Yes, sir.

The Court: Has there been any representations made to you by counsel, or by anyone else, as to the sentence which you might expect from the Court in this case?

Mr. Williams: I was told I could expect the maximum.

The Court: Of death in the electric chair?

Mr. Williams: Yes, sir.

The Court: In light of that representation made to you by your counsel, you wish to withdraw your plea of not guilty and enter a plea of guilty to the charge?

[fol. 27] Mr. Williams: Yes, sir.

The Court: Upon your plea of guilty, charged with the crime of kidnapping as set forth in the Information in case number 16,911, the Court finds you guilty of the crime and offense of kidnapping as set forth in the Information. Do you have any statement you wish to make, or any legal reason to assign, why the Court should not pass and impose sentence upon you, in accordance with your plea of guilty as charged?

Mr. Williams: No, sir.

The Court: As I told you in the other case, you have the right to have your sentence deferred for at least two days, by the Court, before formal sentence is entered under your plea. You may waive that, however, and upon your request, the Court may impose sentence immediately. What is your request?

Mr. Williams: That you impose sentence now.

The Court: At this time, without further delay?

Mr. Williams: Yes, sir.

The Court: Do you have any statement you wish to make, as counsel for this defendant?

Mr. Woodson: I would rather reserve them, if the Court please.

The Court: Very well. Now, Mr. Simms, as representing the State you say you have some record you wish to [fol. 28] make?

Mr. Simms: If your Honor please, the position of the State, will be explained to you by the County Attorney, Mr. Edmondson.

The Court: Very well.

STATEMENT OF FACTS ON BEHALF OF STATE, READ BY MR. EDMONDSON

Mr. Edmondson: If the Court please, I think that your Honor should be fully advised of the facts in this case, before any recommendations should be made at all, as to the punishment, inasmuch as before your Honor appears only the Informations charging each of these crimes, and the pleas of guilty which the defendant has made. Therefore, we have typed up a brief statement of the facts concerning both of these crimes and the actions of this defendant and the facts and circumstances that would be admissible in Court on the trial of either of these cases, and rather than reading the entire thing, I will make reference to it and then submit it to your Honor for reading it in detail, if that is the desire of the Court.

The Court: I would prefer that you just read it.

Mr. Edmondson: All right, sir.

The Court: In its entirety, then we will have it before the Court without further delay.

Mr. Edmondson: On June 16, 1956, at approximately 1:10 a.m., Pete Williams drove into the Hudson Service Station [fol. 29] at 3919 South Peoria in the City of Tulsa, in a black or dark blue 1947 Pontiac Tudor Sedan, and asked Claudie Kirk, who was the attendant on duty, to fill up the tank with gas, which Kirk did. Williams asked the attendant how much he owed him and then reached in the back seat of the automobile; pulled out a .38 caliber revolver

and told the attendant that he wanted his money. Kirk gave Williams approximately $30 in currency and Williams demanded that they go inside the station and get more money.

After the attendant and Williams were inside the building, Williams, at gun point, forced Kirk inside the restroom of the building and told Kirk that if he came out "I will blow your head off." Williams then left the scene of the robbery in the Pontiac automobile. Later that morning, Williams in an attempt to outrun Tulsa police officers, wrecked the Pontiac automobile at 37th and Yale, and by his own admission, escaped from the officers who blockaded the area, by crawling through a culvert some 200 feet north from where his automobile had been wrecked, and then went back over to Harvard to a wooded area where he remained under dark the next evening.

At approximately 5:30 p.m., Sunday, June 17, 1956——

Mr. Woodson: I would like to interpose an objection to the statements by the County Attorney, as to phases that [fol. 30] followed the act of armed robbery itself, which is the plea——

The Court: I am considering this statement as to both cases.

Mr. Woodson: All right.

The Court: Overruled.

Mr. Woodson: Exception.

Mr. Edmondson: At approximately 5:30 p.m. Sunday, June 17, 1956, Williams was standing near the stoplight at 3rd and Cheyenne by the Public Library in the City of Tulsa, when a car being driven by the Reverend Tommy Cook stopped at the stop sign. Williams walked up; put the gun on Cook and entered the automobile and told Cook to do what he said and he wouldn't hurt Cook. He then directed Cook to drive east and south on Highway 64. They stopped at Bixby, Oklahoma where Williams took a five dollar bill from Cook's billfold and paid for the gas and they continued south on U.S. 64. Williams forced Cook to drive to a point approximately 3 miles east and 4 miles north of Taft, in Muskogee County, to the end of a dead-end road, where Williams walked Cook out into the weeds where, according to Williams' own statement, Cook kept begging not to be tied up for that he, Cook, would have to stay there all night—no one would find him. Cook, according to

Williams' statement had his hands up in front of his face [fol. 31] and Williams shot Cook from the right side of the head, behind the ear. According to the autopsy report, the gunshot wound in the head produced death practically instantaneously and——

Mr. Woodson: I would like again to interpose an objection here, that the defendant has pleaded guilty to two charges, one the armed robbery and one the kidnapping. The statements being made by the County Attorney relate to another charge, that has been passed upon in another jurisdiction.

The Court: Well, I will consider it as the statement of the County Attorney of course and as a continuing thing in the matter, which I think is proper to advise the Court of all the facts surrounding the two crimes. Of course, as far as the highjacking case is concerned, it might not at all be competent, but from the kidnapping standpoint, it is, of course, a continuing thing, as long as he had the victim in his charge and under his control, I think all the facts pertinent to the incident are competent to the Court and the Court should know, so I will overdule your objection.

Mr. Woodson: Exception.

Mr. Edmondson: —and in the opinion of the pathologist who performed the autopsy, the gun was fired from very close range, certainly less than six inches and according to the angle of fire, and the angle of the bullet into the [fol. 32] head, the opinion of the pathologist was that the shot was fired from the rear of the deceased and to the right of the deceased.

Following the murdering of Cook by Williams, Williams took the Oldsmobile convertible belonging to Cook and drove to Porum, Oklahoma, where he entered a beer parlor and bought beer. He then drove in Cook's car to Talihina, Oklahoma, arriving at Talihina between 10:00 and 10:30 that same Sunday evening. Shortly thereafter, Williams committed an armed robbery of a former employer, taking approximately $1,000.00 in the armed robbery at Talihina. Shortly after the robbery and while Williams was being chased east of Talihina on highway 63, and at a point approximately 18 miles east of Talihina, after abandoning the car, Williams walked out into the woods trying to work his way back to Talihina, and in his own words, was dodging the road and the law. After arriving at Talihina Monday

night, Williams went to the Standard grocery store where he crawled through a window for the purpose of buying groceries to take to the mountains.

Mr. Woodson: Again I want to object to the statements being made by the County Attorney. We are going through a possible alleged fourth offense.

Mr. Edmondson: May I state my position?

[fol. 33] The Court: No. This is of course, merely a statement——

Mr. Woodson: These are allegations from this point on, your Honor.

The Court: Very well, but I am going to overrule your objection and allow you an objection to the entire statement being made.

Mr. Woodson: All right, thank you.

The Court: And I will overrule your objection so you won't need to repeat it.

Mr. Woodson: All right. Exception.

Mr. Edmondson: After Williams left Standard, he offered the person $30 to take him to Wilburton, where he caught a bus bound for Ft. Smith. At approximately 12:36 a.m. June 19th, Williams was arrested on the bus by a member of the Oklahoma Highway Patrol at Poteau, Oklahoma, and approximately an hour later, Williams admitted that he had killed Tommy Cook by shooting him in the head with a .38 caliber pistol. At approximately 6:30 the same morning, Williams led officers to the body of Tommy Cook where he was found dead from a gunshot wound and at approximately an hour later, Williams led officers to a location in LeFlore County, about 3 miles west of Muse, Oklahoma, for the purpose of showing the officers where he had disposed of the gun he had used to take Cook's life.

[fol. 34] The Court: Anything after the completion of the crime involved here, I don't think would be any assistance to the Court, unless you have something that you feel is, because he admits the crime here. This all goes to his admission of the crime. Of course, then, I don't think that is necessary to the complaint.

Mr. Edmondson: No, sir, there is nothing else, only one statement contained there with reference to the crime, itself, was the fact that an F.B.I. examination was made of the bullet and the gun that he had——

The Court: He admits the crime. Of course, I take

judicial notice of the fact that he has heretofore entered a plea of guilty to the murder of this victim, that is correct, is it not?

Mr. Williams: Yes, sir.

The Court: And that was in Muskogee County?

Mr. Williams: Yes, sir.

Mr. Edmondson: Yes, sir.

The Court: And that in light of that plea, the District Court judge there found him guilty of the crime of murder of this victim and imposed a sentence of life imprisonment, is that correct?

Mr. Williams: That is correct.

Mr. Edmondson: That is correct.

[fol. 35] The Court: All right.

Mr. Edmondson: I think this other matter should be mentioned, if the Court please, with reference to the sentencing. Williams on September 18, 1956 was found to be legally sane by the staff of the Eastern Oklahoma State Hospital at Vinita. In addition I would like to refer to the records of the F.B.I. insofar as this defendant's past criminal record is concerned.

The Court: I was going to ask about any record on that, so you may proceed on that.

Mr. Edmondson: According to the records of the F.B.I. in Washington, the defendant started his first criminal act, for which there is a record, on October 16, 1944 at Long Beach, California, where he was arrested for grand theft, automobile and burglary, and released to the Juvenile Bureau. On July 22, 1945, Williams was arrested in Tulsa for automobile theft and on August 1, 1945, was released to the United States Marshal for prosecution of a violation of the Dyer Act. On August 12, 1945, Williams entered the Federal Correctional Institution at Inglewood, Colorado to serve a three year term for violation of the Dyer Act. On March 29, 1947, Williams was arrested by the Police Department at Hannibal, Missouri, on charges of Escape from a Federal Penitentiary and for violation of the Dyer Act, and on May 28, 1947, was sentenced to 18 months term to run consecutively with a prior Federal [fol. 36] conviction. On October 3, 1949, Williams was arrested by the State Police at Michigan City, Indiana on a charge of armed robbery and was sentenced to serve a term of twelve years in the Indiana State Penitentiary.

If the Court please, that very briefly, but in substance, covers the record of this defendant and also the facts surrounding the commission of this crime.

I mention all of these facts from the beginning of this act on June 16, 1956, clear up through his arrest and capture in LeFlore County for one reason. The evidence discloses the fact that the burglary, or rather the kidnapping, the material element of that crime, that is the obtaining of something of value as a result of kidnapping Reverend Cook; that thing of value was his escape from the commission of armed robbery, under the charge he has just pleaded guilty to. Our court has repeatedly held, and particularly in a recent case, that on a charge of kidnapping, although no note was sent by way of ransom, no other form of extortion committed, except that the defendant is forcing the victim to provide his means of escape from another crime, that that constitutes a thing of value, and therefore, connects up the crime, the kidapping.

The Court: I don't think you need go into that. He has admitted the crime and entered a plea of guilty.

[fol. 37] Mr. Edmondson: And then following that, in pursuance of that escape, the defendant took the life of Reverend Cook.

Now, we come, of course, to the question of what should be done in view and in face of these pleas of guilty and these facts. The question that appears to our office in making a recommendation for your Honor is this, as to whether or not this defendant should be sentenced to the penitentiary for a period that would cover his natural life, and close whatever doors we can legally close to his ever possibly being paroled. Of course, that would be available, at least to the extent of any degree that we here in this court can accomplish it, by extremely long sentences for a number of years or life imprisonment, two consecutive terms following the sentence of life imprisonment in Muskogee County. Of course, there is the other possibility of imposition of the death penalty, and I would like to refer to that, in all due respect to this Court, briefly. It is the opinion of our office that the death penalty should be imposed only in exceptional cases, or very exceptional cases. It should not be imposed necessarily for punishment to a defendant, but rather a much

higher and more honorable purpose for the imposition of that sentence is the protection of society; whether or not this court, Your Honor, feels that it is necessary from [fol. 38] the standpoint of society and the protection of society, to take this defendant's life through execution. I would like to have these two things to say in that regard, your Honor. First of all, throughout this defendant's adult life and his teenage life as far as that is concerned, he has proven his complete disregard for our law and for the lives of other people in society. We have before us the commission of three armed robberies, his pleas of guilty to the one today, and service of his sentence on the one in Indiana and the one that he committed at the tail end of his escape from this crime, all of which the Legislature has declared its intent to be, that the death penalty can be imposed. Likewise we have the kidnapping charge which the defendant has admitted, which also carries that penalty. Even in this particular case, where he has pleaded guilty, I think it is very safe and very logical for us to assume, that had Mr. Kirk at this Hudson service station, the day before Reverend Cook lost his life,—had Mr. Kirk done anything comparable to what Mr. Cook did by way of resistance, that we would have a murder charge here in Tulsa County, as well as the murder in Muskogee County. We even have the defendant's statement that that is exactly what he would do if Kirk made any resistance at all. I certainly don't want to appear to your Honor to be eager in the recommendation of the death penalty, but I would like to submit this to the [fol. 39] court, this is not the first instance where the courts in Oklahoma have imposed the death penalty for crimes identical to the ones the defendant has pleaded guilty to today. On at least two occasions in the history of Oklahoma, in our own Oklahoma courts, have District judges imposed the death penalty for armed robbery, and on both occasions has the Criminal Court of Appeals affirmed the judgment of that trial court, imposing the death penalty. I think your Honor should have the benefit, if you are not aware of those cases, of their citations, therefore I brought those cases to the court room today. One of them, the defendant was given the death penalty on this armed robbery, where he fired some shots at the victim and the victim of the robbery subsequently died, which

gives us a very comparable case to the one we have here on trial today. But in the other case, there was no death involved.

Mr. Woodson: Can the defendant sit down, please?

The Court: I think he can stand. Go ahead.

Mr. Edmondson: In the other case, if the Court please, which I have right here before me, decided in 1932, the crime was almost on all fours with this one in the early stages of the crime, in that the defendant stopped a person who was driving his car, forced him to let the defendant in the car with him. After they had driven a certain [fol. 40] distance, he forced the father and mother and some of the children out of the car and then he took a daughter, some eighteen years old with him and was effecting his escape. Subsequently the daughter was found raped. The judge that tried this case imposed the death penalty and it was appealed to the Criminal Court of Appeals, and the court unanimously affirmed the death penalty, where no death was involved. By way of comparison we have the life of Reverend Tommy Cook that has been taken. Naturally the question comes before us as to whether or not, in view of the fact that the District Court of Muskogee County only imposed a sentence of life imprisonment for the murder of Tommy Cook, whether or not under those circumstances, we can justifiably impose the death penalty here; but I think upon a careful examination of these two cases and three other cases, where pleas of guilty to the crime of murder in Oklahoma, where the death penalty has been affirmed by the appellate court and these decisions appearing in our reports and I think they should be referred to your Honor also; that in view of that precedent and the precedent set down specifically in the language in this Ellis case, where there was no death involved and yet the death penalty was imposed and affirmed, and the court specifically said in this Ellis case, that the punishment is not excessive, in view of the fact that [fol. 41] this is the crime of armed robbery, and that the Legislature has declared its intent and its purpose that such a crime should be punishable by the imposition of the death penalty and that in a case like that one, that they did not think that it was excessive, and I think from reading the entire language of that case, that you will find that it very closely parallels this one, and that the

only difference was that the defendant in that case, Ellis, committed the crime of rape following the armed robbery, instead of murder.

Without any other statement, if the Court please, although it is with a great deal of reservation, because we certainly don't envy your Honor, in having to make a decision that involves the very life of a human being, but it is the recommendation of the State, for the purpose of the future protection of society, inasmuch as this defendant has not only evidenced his attitude toward life, but has also proven his ability to escape not only from the penitentiary, but from jails as well,—I am sure your Honor, is familiar with the fact, that while he was incarcerated in Muskogee County awaiting trial, that he effected his escape, and in view of that set of facts, I cannot in good conscience do anything else, from the standpoint of a representative of the State, but recommend to your Honor that the death penalty be imposed. Thank you, sir.

Mr. Woodson: May we have a recess?

[fol. 42] The Court: Yes. I will take a ten minute recess at this time.

After recess.

The Court: Are you ready to proceed, Mr. Woodson?

Mr. Woodson: Yes, your Honor. You want this defendant to rise, while I address the court?

The Court: No, it is not necessary. He is sitting now. You may proceed.

Mr. Woodson: If the Court please, I will take a limited number of minutes.

The Court: You take all you want, Mr. Woodson. This is an important matter.

Mr. Woodson: In my plea for the life of the defendant, I would like to say one thing, with due respect to the office of the County Attorney, for whom I have a personal regard, that the only two things involved—I agree with the final statements here, first of all that it is a very difficult job and difficult task to impose upon this court the final decision in such a matter of grave import as this, and second, I agree with his statement that there is some eagerness on his part to recommend to the court that a death penalty be imposed. [fol. 43] Surely his statements throughout his argument

so express themselves. It sounded so logical, it was all based on retaliation. It was all based on the antiquated doctrine of an eye for an eye and a tooth for a tooth. The Court well knows that in past generations and in other countries, this same doctrine has attempted to be enforced with total failure. Thieves in Saudi Arabia with their hands cut off, only to go out and commit other crimes. We well know that in England pick pockets were executed in public as a warning to the public that this was something for which they should well represent to all those about them, that they should refrain from these acts, and during the day of execution, when the crowd gathered around to watch, pickpocketing increased. The defendant is here charged with two acts. He is not charged with murder. He is not charged with armed robbery in some other County, he is charged with armed robbery in this County and he is charged with kidnapping in this County. In relation to the armed robbery which he did, as the State stated, and I would like for the Court to know, that in the process of the act no one was injured; a sum of money was taken but no one was hurt, and in relation to the charge of kidnapping, there was no injury committed in this jurisdiction. I have some rather strong feelings, not only for the defendant but for this Court, and for the family of the deceased. [fol. 44] I am sorry that this happened. I wish that I could rectify it. I wish that I could recreate conditions as they were, preceding this, but it is beyond my power or that of any other persons to recreate. The defendant would like to have recreated them too. The defendant has died a thousand deaths in his cell on the eighth floor of this court house. I have repeatedly been up to see him, and of course dealt and talked with him through those bars day after day, and I have seen him reduce himself from a man of about a hundred and sixty or seventy pounds down to a mere skeleton. He too has died. In relation to the offense in Muskogee, in which he was charged with the crime of murder and there pleaded guilty, I should like to introduce the *the* closing statements of the judge of that Court in passing sentence upon the defendant, after he entered his plea of guilty and introduce the full context of it into the record. And may I quote two paragraphs from it and then submit it to the Court. The Court states, "Those are always problems that weigh heavily upon the Court, and that's the

reason that I'm glad that we have a jury of twelve men of the defendant's peers that the question may be decided by. This comes as rather of a surprise." This is after the defendant entered his plea. "This comes as rather a surprise, but as I recall, where a defendant enters a plea of guilty to murder to a district judge, a district court, that no [fol. 45] judge—that no court within the State of Oklahoma when a defendant has entered a plea of guilty to murder and thrown himself upon the mercy of the Court—that the court has never assessed the death penalty. I think that was done in one, in two instances, by the Honorable Sam Sullivan a few years ago where two Choctaw Indians were involved, but the Criminal Court of Appeals very readily set those sentences aside."

And further, "There was a confession alleged. There's some testimony on the part of the defendant that to obtain that confession that you were probably slapped and probably kicked to bring you to the submission—into submission and to sign this certain confession. During that motion I recall that there were some two confessions. One was never brought into court. It was destroyed, and what was in that confession this Court will never know, but the other confession was brought into court, and I read it, and I remember that you stated that it was obtained after you were bodily beaten".

And lastly, "In view of all of those facts, in view of the fact that this defendant has come in here and entered a plea of guilty and has thrown himself purely upon the mercy of this court, it will be the judgment and sentence of this Court that you, Mr. Williams, be sentenced to serve the rest of your natural life in the State Penitentiary at Mc-[fol. 46] Alester, Oklahoma, sentence to begin upon date of delivery to the warden of the penitentiary; and let me say further in view of what I know about the case, I further pledge that so long as I may live that I will never recommend that you be paroled from that institution. That's all." And so upon the plea of guilty to the charge of murder, the defendant was given a life sentence, not a death penalty, a life sentence in that jurisdiction.

I come before the Court with a considerable amount of humility and with deep respect for what the Court has laid upon its shoulders to consider, and I ask for mercy, and I pray for this defendant mercy. I know that he did

wrong. He knows that he did wrong and we have cried together, and we have died together. This man will never be able to walk the streets of this, or any other community again. The sentence that has been imposed upon him already justly is sufficient. He will leave here and he will be delivered to the warden of the State Penitentiary, on another charge and under another sentence, to spend the rest of his natural life, and I tell the Court that a death penalty is barbaric. We will know the history of electrocutions and the imposition of the snuffing of a human life by the State. Your Honor please, the jurisdictions that have had it are gradually one by one eliminating it. The [fol. 47] jurisdictions that have it today well recognize that it has not decreased, or had any effect upon the institutions of crime, and I personally look forward to the day in the State, where the removal of a death penalty will be had and I induce the legislature of this State to so remove it from our statutes.

In closing I want to thank the County Attorney, in my respect for his personal views on the subject, to which with respect I totally disagree, and I want to thank this Court for the consideration that it has given in hearing out my statements. I ask for mercy.

Mr. Edmondson: If the Court please, you made an offer of proof, or rather you offered this statement and observations of the Court in Muskogee County, did you not, Fred? You offered them in evidence, did you not?

The Court: He said he would like to have the complete statement of the District Judge, incorporated in the record. I don't know if you wish to do that or not.

Mr. Edmondson: We don't have any objection to it.

The Court: All right.

Mr. Edmondson: But I would like to offer for the Court's benefit, the latest citation, 119 Pac. 2, 857, a 1941 case, which is the latest case, where a plea of guilty in a lesser court has been affirmed by the Criminal Court of Appeals, in view of the observations of Judge Carroll in [fol. 48] that record that there had been none.

(The transcript of the proceedings had in Muskogee County, before the Honorable E. G. Carroll in this matter, introduced in evidence, are as follows:)

IN THE DISTRICT COURT WITHIN AND FOR MUSKOGEE COUNTY, STATE OF OKLAHOMA

No. 9658 Criminal

THE STATE OF OKLAHOMA, Plaintiff,

vs.

EDWARD LEON WILLIAMS, Defendant

Hearing held at 3:10 p.m., November 19, 1956, in Court room No. 2 of the District Courts of Muskogee County, Oklahoma. The State of Oklahoma appeared by Louis Smith, the County Attorney and Leon Willey, the Assistant County Attorney. The defendant appeared in person and by Paul Gotcher, of Anthis & Gotcher, Muskogee, Oklahoma; and by Cleon Summers, Muskogee, Oklahoma. The Hon. E. G. Carroll presided, and the following proceedings were had and done, as follows, to-wit:

The Court: All right, court's in session. Is there some announcement to be made?

Mr. Gotcher: If your Honor please, at this time the [fol. 49] defendant has signified his desire to withdraw his plea of not guilty and enter a plea of guilty to the charge in the information—as the charge is in the information. Pete stand up. Is it your request at this time, Mr. Williams, to withdraw your plea of not guilty and enter a plea of guilty to the charge contained in the information filed in the District Court of Muskogee County?

Mr. Williams: Yah—yes.

Mr. Gotcher: Did the reporter get that?

The Reporter: Yes, sir.

The Court: Before the Court accepts the plea of guilty, you understand that there's no promises been made, no prearrangements, do you?

Mr. Williams: That's right.

The Court: Do you understand that?

Mr. Williams: Yes.

The Court: And it is your desire to withdraw your plea of not guilty and enter a plea of guilty to murder?

Mr. Williams: Yes, sir.

The Court: Murder of Cook—I forget—what's his name?

Mr. Gotcher: Tom Cook.

The Court: Tom Cook. The plea of guilty will be accepted, Mr. Williams. You want to waive time in which——

Mr. Gotcher: At this time the defendant waives time [fol. 50] in which to be sentenced, and you request to be sentenced at this time?

Mr. Williams: Yah.

Mr. Gotcher: And we desire to be sentenced at this time.

The Court: Gentlemen, you recognize that there's only two verdicts that this Court or the jury could arrive at; that is, relative to guilt?

Mr. Gotcher: Yes, sir.

The Court: One which carries with it death in the electric chair and the other one a life sentence?

Mr. Gotcher: Yes, sir.

The Court: Those are always problems that weigh heavily upon the Court, and that's the reason that I'm glad that we have a jury of twelve men of the defendant's peers that the question may be decided by. This comes as rather of a surprise, but as I recall, where a defendant enters a plea of guilty to murder to a district judge, a district court, that no judge—that no court within the State of Oklahoma when a defendant has entered a plea of guilty to murder and thrown himself upon the mercy of the Court—that the court has never assessed the death penalty. I think that was done in one, in two instances, by the Honorable Sam Sullivan a few years ago where two Choctaw Indians were involved, but the Criminal Court of Appeals very readily [fol. 51] set those sentences aside.

Mr. Williams, I don't know whether you deserve any mercy or not. I don't know all the facts in this case but what I do know is the crime that you have committed was of a—a dastardly act. You took the life of a young boy who was studying to be a minister, a life that you can't return. I'm sure that you recognize that. I don't know anything about you other than what I've read in the press. This matter weighs heavily upon the shoulders of this Court. I want to do the right thing. I may be criticized for what I am about to do, but it developed here today that to continue with a jury trial—I mean that it would be a long, if orderly process; and I recall only recently that in a motion filed by you to suppress certain evidence that certain things, certain evidence has come to the attention

of the Court which might have some mitigating circumstances in the penalty.

There was a confession alleged. There's some testimony on the part of the defendant that to obtain that confession that you were probably slapped and beaten and probably kicked to bring you to the submission—into submission and to sign this certain confession. During that motion I recall that there were some two confessions. One was never brought into court. It was destroyed, and what was in that confession this Court will never know, but the other confession was brought into court, and I read it, and I remember that you stated that it was obtained after you were [fol. 52] bodily beaten.

Those things enter into this lawsuit to some small degree, and I've been—another thing I've been highly concerned with and disturbed by is that I'm wondering whether or not a reversible error was committed this morning. I'm sure it wasn't intentional, but since its happening I have gone to the law book and have read the law and have tried to determine in my own mind as to whether or not this Court should declare a mistrial. The defense this morning filed a motion or read into the record a motion which stated that in the presence of some of the jurors who had left the jury box and had not gotten entirely out of the courtroom that the Deputy Sheriff in full view of this seven men, and, I believe one woman, placed handcuffs upon the defendant. And under Title 22, Criminal Procedure, Chapter 1 of the General Provisions it reads: "Testimony against One's Self—Restraint Prior to Conviction—Chains or Shackles: 22 O.S. 1951, Section 15, is hereby amended to read as follows: 'No person can be compelled in a criminal action to be a witness against himself; nor can a person charged with a public offense be subjected before conviction to any more restraint than is necessary for his detention to answer the charge, and in no event shall he be tried before a jury while in chains or shackles.' "

I've been disturbed about that to some extent that should [fol. 53] we proceed in a long drawn-out trial that even though there should be a conviction, I wonder what the Criminal Court of Appeals would do—whether or not they would feel that a reversible error has been committed, and one of the gentlemen who was the author of this very stat-

ute, the Honorable Kirksey Nix, after the first of the year will be a member of the Criminal Court of Appeals of this State. I, as you well know, made an order this morning directing the Sheriff and the Court Clerk to draw 200 additional names, and that those summonses be served upon the various parties throughout this county summonsing them into court that they serve here as jurors and a jury to be gotten from those 200 to try this defendant.

In view of all of those facts, in view of the fact that this defendant has come in here and entered a plea of guilty and has thrown himself purely upon the mercy of this Court, it will be the judgment and sentence of this Court that you, Mr. Williams, be sentenced to serve the rest of your natural life in the State Penitentiary at McAlester, Oklahoma, sentence to begin upon date of delivery to the warden of the penitentiary; and let me say further in view of what I know about the case, I further pledge that so long as I may live that I will never recommend that you be paroled from that institution. That's all.

[fol. 54] Reporter's Certificate to foregoing transcript omitted in printing.

[fol. 55] CONTINUATION OF FORMAL SENTENCING BY JUDGE WEBB

Judge Webb: Let the defendant stand and come forward. Because of the utmost importance of this proceeding, and because the statutes provide that in a case of this kind that, although I believe it is permissible and possible for the defendant to waive it, but under the circumstances, because he is charged with two offenses known as capital offenses, wherein the death penalty may be inflicted, or life imprisonment, I feel, for the purpose of the record, that even though he has personally waived it, for protection to all the rights of the defendant, that the law demands, that the statute provides for a two day interim before sentence may be or must be made, the Court should pass the formal and final sentence in these two cases for at least two days. It will be the order of this Court at this time, that formal sentencing be continued, and the actual formal sentencing under the pleas he has entered this morning, and upon the judgment

of the Court finding this defendant guilty in each of the two cases, to-wit, case 16910 and 16911, will be passed until Friday morning, February 1, 1957, I believe it is, at 9:30 a.m., or as soon thereafter as it may be reached by the Court in the course of business. This defendant will be remanded to the Sheriff of Tulsa County until that time and until further order.

Mr. Edmondson: He is to be held without bond?

The Court: Well, naturally. That is all.

[fol. 56] IN THE DISTRICT COURT OF TULSA COUNTY OKLAHOMA

TRANSCRIPT OF THE PROCEEDINGS—February 1, 1957

Garn Gordon, reporter.

[fol. 57] COLLOQUY BETWEEN COURT AND PLAINTIFF

The Court: This is the matter of Edward Leon Williams, in case number 16,910, State versus Edward Leon Williams.

Mr. Williams, you have heretofore appeared before this Court, withdrew your plea of not guilty to the charge of Robbery with Firearms, as set out in the Information, and entered your plea of guilty. You were advised of your rights in the matter. The Court heard arguments in reference to the case, statement of facts were presented by the County Attorney's office, the matter of formal sentencing was passed until this time at this hour, after the Court found you guilty as charged in the information of the charge upon your plea of guilty. Now an intervention of time has come about since you entered your plea, and at that time, the Court asked you if you had any statement to make or any legal cause why the Court should not pass sentence upon you, and you said you had none. The Court in taking up the matter at this time, I will give you an opportunity to make any statement, if you have a statement you wish to make, or show any legal cause why the Court at this time should not pass judgment upon you, in accordance with your plea of guilty.

Mr. Williams: Well, one thing in the statement of facts, according——

The Court: You understand this is only with the Robbery with Firearms charge, I am asking you now.

[fol. 58] Mr. Williams: Yes, sir. What I was going to say, according to the way Mr. Edmondson read the statement of facts, why I had been convicted before—oh, the way he said, three times of armed robbery. Now, actually I only had one previous felony conviction.

The Court: And that was in——

Mr. Williams: In Indiana.

The Court: In Indiana, and you served a term for that?

Mr. Williams: Yes, sir.

The Court: Weren't you convicted of a charge in the Federal Court?

Mr. Williams: Yes, sir, but that was a Federal Juvenile—under the Federal Juvenile Delinquency Act.

The Court: You did serve a term and did escape from the reformatory, did you not?

Mr. Williams: No, sir, I don't know as you could call it as an escape. I was working as a trustee up near Inglewood, and I just walked off.

The Court: With that correction of the statement of facts, do you have anything else that you wish to state at this time?

Mr. Williams: No, sir.

The Court: What is your age?

Mr. Williams: Twenty-seven.

[fol. 59] The Court: You are twenty-seven. In case number 16,910, State versus Edward Leon Williams, which is the Robbery with Firearms, it is the judgment and sentence of the Court, taking in consideration the background, all the facts that have come to the Court's attention, and the investigation which has been made,—it is the judgment and sentence of the Court in this case, that you be confined and imprisoned in the State Penitentiary at McAlester, Oklahoma, for a term and period of fifty years. In this case, you will be remanded to the custody of the Sheriff of Tulsa County, without bail, for transportation and delivery to the warden of the State Penitentiary at McAlester, for execution of the sentence.

In case number 16,911, State versus Edward Leon Williams, here charged with the crime and offense of kidnapping as set forth in the Information. Upon arraignment upon this charge, appearing before the District Court, you

entered a plea of not guilty. The case was thereafter set upon the trial jury docket of this Court. At a date prior to the setting of this case, you appeared in this division of the District Court, and before this Court, and expressed your desire to withdraw your plea of not guilty and enter a plea of guilty to the charge of kidnapping as set forth in the Information. You were represented by counsel at all times, and advised of all your legal and constitutional rights. Opportunity was given to you and your counsel at [fol. 60] that time, which was on Wednesday of this week, to make any statement that you cared to make, showing legal cause why judgment should not be pronounced and your punishment fixed by the Court. Statements and arguments were made here in open court and made by the State and by your counsel in reference to the case, and in reference to the punishment. In this case, as in the other case upon which judgment has been passed by the Court this morning, the Court cognizant of the importance of the matter, and the seriousness of the charges, although you stated to the Court that you were voluntarily making your pleas, without any influence being brought to bear upon you, or any promise of any results of the pleas, and stating you were cognizant of the facts, and had been informed that you might expect the extreme penalty in each and both of these cases, and that you were voluntarily making your plea of guilty to the charge. The Court at that time passed the matter for sentencing until this morning to give all parties an opportunity for deliberation upon the matter. You come here at this time for formal sentencing under the judgment of the Court which was entered on Wednesday, finding you guilty of the crime and offense of kidnapping as set forth in the Information.

Do you have anything further to state at this time, or any legal cause to show to the Court, why the Court should not [fol. 61] fix and assess your punishment upon your plea of guilty to the charge of kidnapping as set forth in the Information?

Mr. Williams: No, sir.

The Court: Now, at that time on Wednesday, there was a statement of facts made by the State, relative to this case, and the sequence of events and the facts surrounding the sequence of events and the facts surrounding the commis-

sion of this crime. Do you have any correction to make in reference to the statement of counsel for the State, in that regard?

Mr. Williams: No, sir.

The Court: Those facts were true?

Mr. Williams: Yes, sir.

The Court: And you at this time admit that they were true and that you committed the acts as set forth by the State, that is correct, is it

Mr. Williams: Yes, sir.

The Court: All right. Do you have anything further to say on behalf of this defendant?

Mr. Woodson: Nothing further.

The Court: The Court has been very deliberate in the matter of this case, has given it hours of consideration, and investigation; investigation of your record, investigation of the facts which have been alleged, [fol. 62] which have been stated, and which you admit were part of this crime which you have committed in Tulsa County, which resulted in the murder of the victim, Reverend Cook, to which you have pled guilty and been sentenced in Muskogee County, and which the Court takes into consideration, that murder as being a part and parcel of the crime which is here, as a continuing thing. It is the Court's opinion, that there has never been in the history of Tulsa County, a more brutal, vicious crime committed, this crime to which you have pled guilty here. The fact that you have pled guilty to the crime of murder in Muskogee County and received a life sentence there, is not a particularly or material consequence in the matter of the Court passing sentence in this case. The Legislature of the State of Oklahoma has fixed the penalty upon the crime of kidnapping and saw fit to make it a capital offense and to establish a minimum and a maximum penalty. The maximum penalty being life imprisonment or death in the electric chair. It is the Court's opinion that in so doing the Legislature of the State of Oklahoma had in mind a case parallel to this and to fix the punishment upon the charge of kidnapping, the conviction thereof, where the facts were of a similar nature to this and establish the crime as a capital offense. A matter of this kind, of course places a great burden upon a Court upon a plea of guilty, and

[fol. 63] especially where mercy has been pled as it was so eloquently pled for by your counsel in this case. It is not easy to pass sentence in a matter of this kind. The matter of rehabilitation in your case, and which is one of the essential purposes of fixing sentence by a court, punishment of a defendant, is passed in this case. Your record discloses that. The record discloses that you have been embarked upon a career of crime since you were a very young man; a series of highjackings, robbery with firearms, resulting and ending up in murder and kidnapping. There is no possibility of rehabilitation. The only purpose of the Court fixing and assessing the punishment in this case is two-fold, first as a deterrent for others committing like crimes, second, for the protection of society. The last to my mind in this case is the most important, and the mind and heart and conscience of this Court brings about the conclusion in this case, that you have forfeited the right to continue to live in the State of Oklahoma or in the community. Our Criminal Court of Appeals in my opinion, —not in a like case, because I don't find any record in our State, where on a plea of guilty of kidnapping, or conviction, that there has been a maximum punishment announced by the Court. I don't think there has been a case like this before the Criminal Court of Appeals on a prior matter. This Court would be derelict, if it wouldn't inflict a punishment in this case upon you that would protect society from [fol. 64] any further like crimes upon your part. The record shows that you have twice escaped from institutions where you have been committed by legal action, convincing the Court that the public, even though you are incarcerated in the penitentiary, would still not be safe. Taking all those things into consideration in this case, as I said, I think the Court would be derelict in its duty, if I didn't impose the extreme penalty in this case. Whether or not the Criminal Court of Appeals of our State will uphold it or not, is not my concern.

So it will be the judgment and sentence of this Court, having found you guilty of the crime of kidnapping as set forth in the Information in case number 16,911, wherein the State of Oklahoma prosecutes you, Edward Leon Williams, under the statutes in such cases made and provided, it is the judgment of the Court that you be sentenced to

death. It is the further order of the court that you be remanded to the custody of The Sheriff of Tulsa County, Oklahoma, with directions to forthwith transport you to McAlester, Oklahoma, and deliver you to the custody of the warden of the State Penitentiary of Oklahoma, at McAlester, Oklahoma, and that the warden of the State Penitentiary at McAlester, Oklahoma, will on the 25th day of April, 1957 carry out the judgment and sentence of this Court, as provided by law. That is all.

[fols. 65-69] Mr. Woodson: If the Court please, we give oral notice of our intention to appeal.

The Court: Very well.

[fol. 70] In the District Court in and for Tulsa County Judicial District 14 State of Oklahoma

Case No. 16911

The State of Oklahoma Plaintiff,

vs.

Edward Leon Williams, Defendant

Judgment and Sentence on Plea of Guilty For Kidnapping.—February 1, 1957, filed February 5, 1957.

The prisoner Edward Leon Williams being personally present in open court and having been legally informed against and arraigned and having plead guilty of the crime of: Kidnapping charged in said information and having then and there in said court been duly and legally tried and convicted of said crime, and upon being asked by the court whether he had any legal cause to show why judgment and sentence should not be pronounced against him at this time and having no good reason why it should not be pronounced against him, and none appearing to the court,

The Court does now hereby adjudge and sentence the said Edward Leon Williams to be imprisoned in the State [fol. 71] Penitentiary at McAlester, Oklahoma, the penalty fixed at death in the electric chair, the date of execution is set for April 25, 1957 for the offense.

It is therefore hereby considered, ordered and adjudged

by the Court that the said Edward Leon Williams who upon his oath in open court states his age to be 27 years be imprisoned in the State Penitentiary at McAlester in the State of Oklahoma and confined in said Penitentiary until April 25th, 1957 for said offense of Kidnapping, on which date the said defendant shall be put to death as provided for under the laws of this State, said term of sentence to begin from the date of his delivery to the warden of said Penitentiary and it is further ordered that said defendant pay the costs of this prosecution, taxed at $114.70 for which judgment is hereby rendered against the said defendant; and thereupon the court notified the defendant of his right to appeal.

It is further ordered and adjudged by the Court that the Sheriff of Tulsa County, State of Oklahoma, transport said Edward Leon Williams to the said Penitentiary at McAlester in the State of Oklahoma, and that the warden of said Penitentiary do detain the said Edward Leon Williams and execute the judgment and sentence according to the judgment, sentence and order; and that the clerk of [fols. 72-76] this court do immediately certify, under the seal of the Court and deliver to the Sheriff of Tulsa County, State of Oklahoma, a copy of this judgment, sentence and order, to accompany the body of the said Edward Leon Williams to the said Penitentiary at McAlester in the State of Oklahoma and to be left therewith at the said Penitentiary and the said copy to be the warrant and authority of the said Sheriff of Tulsa County, State of Oklahoma, for transportation and imprisonment of the said Edward Leon Williams as hereinbefore provided.

Done in open Court this 1st day of February, 1957.

Leslie Webb, Judge.

[fol. 77] IN THE DISTRICT COURT WITHIN AND FOR TULSA COUNTY, STATE OF OKLAHOMA

No. 16911

STATE OF OKLAHOMA, plaintiff,

vs.

EDWARD LEON WILLIAMS, defendant

MOTION TO VACATE JUDGMENT AND SENTENCE AND GRANT A NEW TRIAL—Filed February 19, 1957

Comes now, Edward Leon Williams, the defendant above named, and moves the Court to vacate its judgment and sentence entered herein February 1, 1957, and grant him a new trial, and permit him to withdraw his plea of guilty entered herein, on the grounds: That at no time was competent evidence in aggravation of the offense introduced, and the remarks made at the hearing preceding the imposition of said sentence by the County Attorney in aggravation of said offense were incompetent, irrelevant and immaterial and were prejudicial to this defendant; that the defendant had received no notice of the presentation of any matters in aggravation and the presentation of such constitutes surprise and failure to apprize the defendant of the matters in aggravation that he must meet; that the Court considered [fols. 78-81] matters outside of the record which were incompetent, irrelevant and immaterial; that the punishment assessed is disproportionate to the crime of kidnapping as charged in Tulsa County, Oklahoma; that news media and public clamor influenced and prejudiced the Court and its officers and thereby affected the sentence to defendant's prejudice; that the extent of punishment received on this charge is actually punishment for the separate crime of murder in Muskogee County, and for which he had been previously convicted and sentenced and has thereby in practical effect been twice put in jeopardy of life and liberty and has been twice punished for the same offense, and that each and all of the above grounds constitute prejudicial error.

John A. Ladner, Jr., Fred Woodson, Jr., Public Defenders. By John A. Ladner, Jr.

[File endorsement omitted.]

[fol. 82] IN THE DISTRICT COURT OF TULSA COUNTY OKLAHOMA

No. 16,910

STATE OF OKLAHOMA,

vs.

EDWARD LEON WILLIAMS, defendant

and

No. 16,911

STATE OF OKLAHOMA,

vs.

EDWARD LEON WILLIAMS, defendant

Before Honorable Leslie Webb, Judge.

APPEARANCES:

For the State—Mr. J. Howard Edmondson, County Attorney, by Mr. Robert Simms, assistant.

For the Defendant—Mr. John A. Ladner, Jr. Mr. Fred Woodson, Jr., Public Defenders.

TRANSCRIPT OF PROCEEDINGS ON MOTION TO VACATE JUDGMENT AND SENTENCE AND MOTION FOR NEW TRIAL—March 1, 1957

Garn Gordon, reporter.

[fol. 83] The Court: You may proceed in the case of State versus Edward Leon Williams.

Mr. Ladner: May it please the Court, the defendant has filed a motion in this case for the Court to vacate its judgment and sentence entered herein February 1, 1957 and grant him a new trial. The motion is further to permit him to withdraw his plea of guilty and the motion is further to grant him a new trial. The grounds for this motion, or these motions, is that at the time the defendant entered his plea of guilty, remarks at great length were made by the County Attorney in aggravation of the offense, or offenses of which the accused has been either convicted or accused of during his entire lifetime. Remarks made at the hearing

and proceedings at that time were incompetent, irrelevant and immaterial and were prejudicial to this defendant. The statutes and the case law of this State require that evidence in aggravation, or for that matter, evidence in mitigation, but more specifically evidence in aggravation must be presented as evidence in the trial of a law suit by the presentation of witnesses' sworn testimony, or by court records duly authenticated. Such was not done in this proceedings. For the further grounds that the defendant at no time received any notice of the presentation of any matters in aggravation by the County Attorney and that [fol. 84] failure to present the defendant or his counsel with such notice of matters in aggravation, constitute surprise and a failure to apprise the defendant of the matters in aggravation that he must meet. This is in violation of the basic tenet that a man, or an accused, a defendant is entitled to know what he is going to have to face in the course of a trial, or in the course of a hearing before a judge, in determination of his sentence. On the further grounds that the punishment assessed to the charge of kidnapping, which is the only charge that this appeal is being made, was disproportionate or the punishment to the charge of kidnapping is disproportionate to the charge, as it has been charged here in Tulsa County. The punishment is apparently and obviously by the record assessed on the grounds and by virtue of a murder in Muskogee County, and over which this court has no jurisdiction, and that that happened in Muskogee County, and that that happening in Muskogee County was presented here not by sworn testimony and evidence, again to the defendant's prejudice, after having already been convicted as we say, and sentenced for that crime in Muskogee County. The sentence, the punishment assessed here by this Court is therefore, disproportionate to the crime of kidnapping as charged in Tulsa County, Oklahoma. The defendant alleges that each and all of the above grounds constitute prejudicial error and ask that this motion be granted.

[fol. 85] Mr. Simms: May it please the Court, as I view the motion of the defendant, I have divided it into five grounds, first, as he has stated that there was no competent evidence in aggravation of the offense introduced, and directing that particular ground of the motion to the statement

made by Mr. Edmondson and what the defendant calls aggravation of the offense. As the record reveals in this particular case, this defendant entered his plea of guilty and I think certainly in this case, as in all cases of this particular import, this Court certainly has the right to inquire into all the surrounding facts and Mr. Edmondson in that statement, set forth to the Court, the facts that were revealed by the investigation, and the facts that were revealed by the defendant's statement to officers of another County. The fact that those statements, and those particular items, which Mr. Edmondson called the Court's attention to, were prejudicial to this defendant, is of no import, because they are true, and the defendant had not only one, but numerous opportunities afforded him by this Court to offer evidence or statements in mitigation of those facts.

As to the defendant's second ground, that he had no notice of the presentation of the matters, as your Honor recalls and as the record in this case reveals, on a Wednesday morning, following the plea of guilty to the charge [fol. 86] of kidnapping by this defendant, and following the statement of facts by Mr. Edmondson, the defendant was desirous of waiving time for sentence, but this Court feeling the gravity of the situation, proceeded to give the man, this defendant, a two day interval between the time of the plea and the time sentence was pronounced, and certainly he cannot say that at the time sentence was pronounced, he did not know of these matters that Mr. Edmondson gave to your Honor in the statement, because there was that two day interval, and even on Friday, following the plea of guilty on Wednesday, this Court, as the record reveals, again asked this defendant, Williams, if he had any cause to offer this Court why this Court should not pronounce sentence. Therefore, I can hardly believe that the ground stating surprise is well taken.

As to the Court considering matters outside of the record which were incompetent, irrelevant and immaterial, and that the punishment is disproportionate, I think that is a matter which is addressed solely to the discretion of this Court, because I can hardly believe in my own heart and in my own mind that when a kidnapping, such as this with robbering being the motive, results in the death of the person being kidnapped, can we say that such a sentence as imposed on Pete Williams is either excessive or dis-

proportionate to the crime that he admits that he committed. [fol. 87] They also make reference in their motion to the fact that he was charged and convicted of the separate crime of murder in Muskogee County, and that is true; but in answer to that, I have but this to call to your Honor's attention, they were two separate offenses, but they were so closely connected, that I think certainly this Court had every right to take the facts of the murder into consideration in assessing the punishment in the kidnapping charge; and that same argument, I believe, applies to their fifty ground, that he, in practical effect as they put it, had twice been put in jeopardy of his life and liberty. I think that ground is without merit, because the murder happened in Muskogee County and although it is a part and the end so to speak to the crime of kidnapping he committed in Tulsa County, they are in fact and in law not separate offenses. Therefore, we respectfully request that the motions filed on the part of this defendant be overruled, and the defendant ordered transported again by the Sheriff to be delivered to the warden of the state penitentiary at McAlester, for the carrying out or execution of the sentence that was heretofore imposed.

The Court: Is there anything further from the counsel on their motion?

Mr. Ladner: I believe not, your Honor.

The Court: Very well. It is the opinion of the [fol. 88] Court that the motion is not well taken under the circumstances and facts as existed at the time of the entry of the plea by the defendant. The fact that the Court passed in this case, for a period of two days, even though the defendant had requested immediate sentencing, would have relieved the Court of any necessary for delay in the formal sentencing of the defendant, the Court felt at the time though, because of the seriousness of this and the possibility of the Court invoking the supreme penalty in this case, that the defendant should be allowed, as a matter of justice and right, to that period of time in which to deliberate upon this matter. I feel that perhaps if the defendant had returned following the two day interim, and had requested at that time to withdraw his plea of guilty, that the Court would, or a possibility he would allow him to do so and let him stand trial before a jury; but he remained mute upon that although repre-

sented by counsel at all time, was fully advised of all of his rights; every constitutional and legal right by law which surrounds the defendant, I think has been afforded this defendant in this case. It was then the judgment and still the judgment of the Court, that the penalty invoked was right under the circumstances and the facts, and I feel that there has been no error made. Therefore, the motion and in its entirety and all aspects will be overruled [fol. 89] and denied. The defendant will be ordered to the State penitentiary of the State of Oklahoma and redelivered to the warden thereof, for execution of the sentence which has heretofore been rendered.

You may make any record you care to.

Mr. Ladner: The defendant asks that time be allowed for case-made, if it hasn't already been done. I believe that it has, but I want to make sure of that.

The Court: The record that has been heretofore ordered will, of course, stand as heretofore made. Now if you care to—whether this is an appealable order here, and I take it it is, if you wish to give notice of intention to appeal from the action of the Court at this time upon your motion, refusing to set aside the judgment, I will allow you to take an exception to the Court ruling now.

Mr. Ladner: Yes, sir.

The Court: And give notice of your intention to appeal. I want you to have and I want you to afford this defendant every legal right that is possible for you to do. He is entitled to that and I will help you to do it.

Mr. Ladner: Yes, sir. Of course, the defendant takes exception to the ruling of the Court as to this motion or these motions, and asks that the appeal on this motion be incorporated with the appeal that has already been stated. [fols. 90-99] The Court: It will be so ordered, and the time as allowed heretofore will apply to this notice of appeal now given, upon the Court's action in overruling your motion to set aside the judgment and to allow the defendant to withdraw his plea which has heretofore been entered, all of which has been denied by the Court. Very well. That is all.

[fol. 100] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 101] [File endorsement omitted]

IN THE CRIMINAL COURT OF APPEALS OF THE STATE OF OKLAHOMA

No. A-12,467

EDWARD LEON WILLIAMS, plaintiff in error,

vs.

THE STATE OF OKLAHOMA, defendant in error

SYLLABUS

1. Two things are clear under the provisions of 22 O. S. 1951 §§ 973, 974, and 975 in regard to taking of evidence in aggravation or mitigation of punishment. First, pursuing this method of procedure, is a matter of the trial court's sound discretion, and second, its use is contingent upon the request of either the state or the defendant.

2. Under the provisions of 22 O. S. 1951 §§ 973, 974, and 975, when the parties fail to make a request for the privilege thereof, the same is waived and some other method of supplying the court with the necessary information for the pronouncement of judgment and sentence may be substituted instead.

3. Where there are several offenses, although each is part of the same transaction, the imposition of separate punishment on conviction of each offense is not double punishment.

[fol. 102] 4. Where the court has a discretion as to the character or the amount of punishment, it may be guided in the exercise of such discretion by accused's past record, by the motives actuating the crime, or by the fact that accused previously has been convicted of a similar or other offenses.

5. The legislature left the matter of imposition of penalty in a case of kidnapping, 21 O. S. 1951 § 745, where the plea is guilty, to the trial court and his sound discretion to be measured by the motive, the act, and its consequences.

6. The legislature did not intend that the courts of the State of Oklahoma should temporize with kidnappers.

7. The indulgence of mercy is within the power of the Pardon and Parole Board and the Governor.

APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY, OKLAHOMA

Honorable Leslie Webb, Judge

Plaintiff in error, Edward Leon Williams, was convicted of the crime of kidnapping, sentenced to death in the electric chair, and he appeals.

AFFIRMED

John A. Ladner, Jr., Tulsa, Oklahoma; Fred W. Woodson, Jr., Tulsa, Oklahoma; Paul Gotcher, Muskogee, Oklahoma, Attorneys for Plaintiff in Error.

Mac Q. Williamson, Attorney General; Sam H. Lattimore, Asst. Att. Gen., Attorneys for Defendant in Error.

[fol. 103] OPINION—Filed December 1, 1957.

BRETT, P. J.:

Plaintiff in error, Edward Leon Williams, defendant below, was charged by information in the District Court of Tulsa County, Oklahoma, with the admitted crime of kidnapping, committed on December 17, 1956, against one Tommy Robert Cooke in the aforesaid county and state, in violation of 21 O. S. 1951, § 745. Defendant first entered a plea of not guilty, but several days subsequent thereto withdrew the same and entered a plea of guilty before Honorable Leslie W. Webb, Judge of the District Court. On the plea of guilty, the defendant was sentenced to death in the electric chair. Judgment and sentence were entered accordingly, from which this appeal has been perfected.

On this appeal, the defendant seeks relief from said penalty of death upon two propositions hereinafter set forth. First, he contends the trial court erred in permitting the county attorney to make a statement in substance detailing the defendant's crime of kidnapping, another offense immediately preceding the kidnapping, (supplying the motive therefor), and other crimes following the kidnapping. The facts, briefly, in regard to the crime herein alleged are that the victim, Tommy Robert Cooke, a theological student, stopped his car at about 5:30 p.m., Sunday, June 17, 1956, at the stop light at the intersection of Third and Cheyenne

[fol. 104] Streets in Tulsa, Oklahoma. The defendant, who was standing nearby, approached and at pistol point forced his way into the Cooke automobile, directing Cooke to drive south on Highway 64. Thus, the crime of kidnapping was completed by these acts. Norris v. State, 68 Okl. Cr. 172, 96 P 2d 540. Thence, he compelled Cooke to drive to Bixby, Oklahoma, where under the persuasion of his pistol, the defendant took from Cooke's billfold five dollars, with which he paid for gas, and forced Cooke to continue on south on Highway 64. At a point approximately three miles east and four miles north of Taft, Oklahoma, in Muskogee County, a point with which he was apparently familiar, the defendant marched Cooke into the weeds off a dead-end road, with Cooke pleading not to be tied up, according to Williams' confession, and shot Cooke on the right side of the head behind the right ear, effecting his instantaneous death. The life of Cooke was apparently taken with the cold blooded intent of eliminating the possibility of positive identification. This might have resulted had it not been for his subsequent depredations. The accused then stole the decedent's automobile and sought to effect an escape from his crime.

[fol. 105] It appears the night preceding the kidnapping, about 1:00 a.m., the defendant drove into a Hudson Service Station, bought gas, asked how much he owed the attendant, reached into the automobile he was driving, got a .39 caliber pistol, told the attendant he wanted his money, thus obtained $30.00 in currency, forced him inside the station for more money, and required him to go into the rest room with the admonition, "You come out and I'll blow your head off." Later, in flight from pursuing policemen, he wrecked his automobile, but avoided apprehension by crawling through two-hundred feet of culvert, hiding in a wooded area until the evening of the kidnapping when he came out and consummated the abduction of Cooke.

It is apparent the motive behind the kidnapping was to avoid apprehension by the officers for the robbery with firearms committed the night before. After kidnapping and killing Cooke, and stealing Cooke's automobile, the defendant drove to Talihina, Oklahoma, where he committed an armed robbery of his former employer of $1,000.00. Later, he abandoned the Cooke automobile and returned to

Talihina where he burglarized a grocery store for food with [fol. 106] which to sustain himself in the mountains. Thereafter, he was arrested on a bus by a member of the Highway Patrol at Poteau, Oklahoma, and a short time later confessed the murder of Tommy Cooke, taking the officers to the point in LeFlore County, Oklahoma, where he had disposed of the gun, which the officers recovered and which ballistics experts established was the gun that killed Cooke. All the foregoing occurrences the County Attorney detailed in his statement relative to the motive for the kidnapping. In addition thereto, his F.B.I. record detailing prior convictions for automobile theft, robbery with firearms, and other crimes was submitted to the trial court. It is thus apparent that this unfortunate defendant, though only twenty-seven years of age, had long been a devotee to crime.

The court proceeded with great care and caution in this case relative to the defendant's constitutional and statutory rights, even delaying the pronouncement of judgment and sentence for forty eight hours after the defendant's plea of guilty, even though the defendant had waived his right thereto and stood ready for the pronouncement of judgment and sentence. Notwithstanding these facts, the defendant complains the trial court erred in allowing the County Attorney to orally state these foregoing facts by way of aggravation. The defendant contends that this procedure was in violation of the provisions of 22 O. S. 1951 §§ 973-975 inclusive, reading as follows:

> [fol. 107] "§ 973. After a plea or verdict of guilty in a case where the extent of the punishment is left with the court, the court, upon the suggestion of either party that there are circumstances which may be properly taken into view, either in aggravation or mitigation of the punishment, may in its discretion hear the same summarily at a specified time and upon such notice to the adverse party as it may direct.
>
> "§ 974. The circumstances must be presented by the testimony of witnesses examined in open court, except that when a witness is so sick or infirm as to be unable to attend, his deposition may be taken by a magistrate of the county out of court, at a specified time and place, upon such notice to the adverse party as the court may direct.

"§ 975. No affidavit or testimony, or representation of any kind, verbal or written, can be offered to or received by the court or member thereof in aggravation or mitigation of the punishment, except as provided in the last two sections."

In this connection, it has been held that a plea of guilty in a capital case, it is for the trial court to determine whether the defendant should be punished by life imprisonment or by imposition of the death penalty. In re Watkins, [fol. 108] 21 Okl. Cr. 95, 205 P. 191; In re Opinion of the Judge, 18 Okl. Cr. 598, 197 P. 546; In re Opinion of the Judges, 6 Okl. Cr. 18, 115 P. 1028. Nevertheless, on a plea of guilty, the provisions of the foregoing statute may be invoked when request is made for the taking of evidence on the question of aggravation or mitigation of punishment. This request may be made by the state or the defendant.

It has been held not to be improper to employ this method of procedure in the absence of a request therefor. In re Watkins, supra; State v. Arnold, (Idaho) 229 P. 748. But, two things are clear under the provisions of § 973. First, pursuing this method of procedure is a matter of the trial court's sound discretion. Second, its use is further contingent upon the request of either the state or the defendant.

We have never been called upon to directly pass upon this question. Under the Criminal Code of Illinois, § 73,18, it is provided:

"In all cases where the court possesses any discretion as to the extent of the punishment, it shall be the duty of the court to examine witnesses as to the aggravation or mitigation of the punishment."

[fol. 109] The wording of this statute would appear to be more mandatory than that of the Oklahoma statute in question. Even so, in Illinois it has been held that the foregoing provisions of said statute are waived by the failure of the parties to the action to invoke its use by request. People v. Crooks, 157 N. E. 218; People v. Throop, 194 N. E. 553; People v. Clark, 56 N. E. 2d 785; People v. Evans, 74 N. E. 2d 708; People v. Thompson, 75 N. E. 2d 345, cert. denied 68 S. Ct. 384, 332 U.S. 856, 92 L. Ed. 425, and 69 S. Ct. 427, 337 U.S. 943, 93 L. Ed.

1747; People v. Carter, 75 N. E. 2d 861, cert. denied 68 S. Ct. 908, 333 U.S. 882, 92 L. Ed. 1157.

It is contended that under the provisions of § 975 it is the mandatory duty of the court to hear witnesses. But, in construing §§ 974 and 975 in light of the provisions of § 973, we are of the opinion that both the provisions of § 974 and § 975 are contingent upon the request for evidence under the provisions of § 973, or it is within the trial court's discretion to pursue some other reasonable method. When the parties fail to make a request for the privilege thereof, the same is waived and some other method of supplying the court with the necessary information for [fol. 110] the pronouncement of judgment and sentence may be substituted instead. 24 C.J.S. 1206, § 1983, n. 33; People v. Pennington, (Ill.) 107 N. E. 871; People v. Withey, 56 N. E. 2d 784, cert. denied 65 S. Ct. 552, 323 U.S. 800, 89 L. Ed. 638; People v. Stack, 62 N. E. 2d 807 cert. denied 66 S. Ct. 477, 326 U.S. 792, 90 L. Ed. 481; People v. Farris, 64 N. E. 2d 456, Cert. denied 66 S. Ct. 973; 327 U.S. 811, 90 L. Ed. 1036; People v. Curth, 75 N. E. 2d 755; People v. Fleming, 94 N. E. 2d 358; People v. Hall, 94 N. E. 2d 873, cert. denied 71 S. Ct. 483, 340 U.S. 937, 95 L. Ed. 676; People v. Rogers, 18 N.Y.S. 2d 844, 174 Misc. 31; People v. Van Orden, 19 N.Y.S. 2d 938, 174 Misc. 65.

In regard to § 973, in Herren v. State, 74 Okl. Cr. 432, 127 P. 2d 384, this court said:

> "Under such statute the extent of the inquiry, when the accused comes on for pronouncement of sentence, is a matter addressed to the sound discretion of the trial court."

In this record, at no time did the defendant attempt to invoke the provisions of this statute. He did not at any time request the taking of evidence in mitigation or offer the slightest statement by way of mitigation. He only asked for mercy, something he did not show his victim. [fol. 111] We are therefore of the opinion that the defendant's first contention under both the law and the facts cannot be sustained. Therefore, the trial court neither erred nor abused his discretion in receiving the County Attorney's oral statement before pronouncing judgment

and sentence. Particularly is this true when the defendant, after the statement had been read into the record, upon the trial court's interrogation, admitted:

> "The Court: Now, at this time on Wednesday, there was a statement of facts made by the State, relative to this case and the sequence of events and the facts surrounding the sequence of events and the facts surrounding the commission of this crime. Do you have any correction to make in reference to the statement of counsel for the State, in that regard?
>
> Mr. Williams: No, sir.
>
> The Court: And you at this time admit that they were true and that you committed the acts as set forth by the State, that is correct, is it?
>
> Mr. Williams: Yes, sir.

[fol. 112] The Court: All right. Do you have anything further to say on behalf of this defendant?

Mr. Woodson: Nothing further.

It is apparent that the defendant not only waived the provisions of 21 O. S. 1951 §§ 973, 974, 975, but he at no time intended to invoke said provisions for mitigation, since apparently he had no such evidence to offer. In the absence of a showing in mitigation in a capital case, the extreme penalty may be imposed. People v. Laing, (Cal.) 41 P. 2d 165.

Finally, it is urged, "The extent of the punishment is excessive and disproportionate to the crime of kidnapping, and the death penalty was actually punishment for the murder committed in Muskogee County, Oklahoma, as part of the same transaction for which the defendant had been previously convicted and sentenced." It is further urged the crime of kidnapping merged into the crime of murder. Neither of these contentions can be sustained, for the law defines murder and kidnapping as two separate and distinct offenses. Therefore, there would not be such thing as merger of these separate offenses. Furthermore, Oklahoma does not recognize such doctrine. Burns v. State, 72 Okl. Cr. 432, 117 P. 2d 155; McCreary v. Venable, 85 Okl. Cr. 169, 190 P. 2d 467; State v. Stout, 90 Okl. Cr. 35, 210 P. 2d 199. [fol. 113] It is further urged these crimes arise out of the same transaction; but such fact will not result in a merger

of these separate and distinct offenses. State v. Moore, (Mo.) 33 S. W. 2d 905. Although certain consequences may follow from certain prohibited acts, but are not necessarily the result of such prohibited acts, each of said acts may be prosecuted and punished as separate and distinct offenses, when so defined by statute. In such case, the punishment imposed would not constitute double punishment. State v. Empey, 65 Utah 609, 239 P. 25 44 A.L.R. 558. In 24 C.J. S. 1213, § 1990, n. 10, the rule is stated:

> "Where there are several offenses, although each is part of the same transaction, * * * the imposition of separate punishment on conviction of each offense is not double punishment, * * * ."

Pagliaro v. Cox, 143 F. 2d 900; Tesciona v. Hunt, 151 F 2d 589; Carroll v. Sanford, 167 F. 2d 878; Murray v. United States, 217 F. 2d 583; Commonwealth v. Ashe, 39 A. 2d 610. Hence, the punishment herein imposed for kidnapping is not objectionable on the ground that it [fol. 114] constitutes double punishment. The statutes of Oklahoma provide the death penalty for three crimes other than murder, 21 O. S. 1951 § 701. These three crimes are robbery with firearms, 21 O. S. 1951 § 801; Rape in the first degree, 21 O. S. 1951 §§ 1114, 1115; and kidnapping, 21 O. S. 1951 § 745, all of which constitute separate and distinct crimes. The legislature, in fixing the penalties for these crimes, apparently regarded them of heinous character because they always present a potentiality of death for the victim. The maximum penalty fixed by the legislature for these crimes indicate a legislative belief that they were regarded as of equal gravity. From the County Attorney's statement to the court, it appears that in addition to the crimes of kidnapping and murder, within the space of three days Williams committed the crime of robbery with firearms three times.

In none of these crimes, as revealed by a search of capital cases, is the possibility of death to the victim so certain as in the crime of kidnapping. For example, death resulted to each of the following victims of Kidnapping: Charles A. Lindberg, Jr., 1932; Charles Fletcher Mattson, 1936; Charles Sherman Ross, 1937; Peter David Levine,

1938; James Bailey Cash, Jr., 1938; Robert C. Greenlease, Jr., 1953; and Wilma Frances Allen, 1955; and others. [fol. 115] The reason for killing the victim is obvious: It is to destroy the means of the kidnapper's positive identification. Hence, it was reasonable for the trial judge in measuring the defendant's intent at the time of the kidnapping in the case at bar, to consider that the defendant, Williams, not only intended to deprive Tommy Cooke of his liberty and property, but to take his life as the means of destroying the defendant's identification. Moreover, it was for the trial court to consider that thereafter it was the defendant's intent to steal Cooke's automobile as a means of avoiding apprehension for the violations he had already committed, and also to use it as an instrument of escape for those crimes he intended to commit in his one man crime wave. Yet, it is urged there is nothing particularly vicious in the single act of kidnapping.

We might agree that contention possesses merit when the kidnapping is viewed as an isolated crime, But, the courts are not required to insulate themselves to facts clearly manifesting intent, and the ultimate consequences of criminal acts. Neither cold law, righteous justice, nor plain logic requires such an approach to the problem [fol. 116] of imposing punishment in any case. To the contrary, justice requires a consideration of all the factors leading up to, at the time of the commission of the act, and even acts occurring subsequent thereto, in determining intent in many cases. When so measured, the instant act of kidnapping presents a most heinous picture. Tommy Cooke was marked for death immediately upon Williams's asserting dominion over him. The defendant's dastardly intent was confirmed when he lost little time in compelling his victim to drive to an isolated, dead-end road where, in a cold and calculating manner, he immediately executed him. These are all matters within the trial court's discretion and consideration in determining the penalty to be imposed.

In People v. Popescue, 345 Ill. 142, 177 N. E. 739, 77 A. L. R. 1199 at page 1206-1207, it is said:

> "It is as much for the protection of the accused as it is for the people that, after the question of guilt has been admitted by a plea or reached by verdict, the

judge should know something of the life, family, occupation, and record of the person about to be sentenced. One of the most natural and common inquiries is [fol. 117] whether the guilty person has ever been previously convicted of the same or similar offense. Courts are usually more lenient in pronouncing sentence upon first offenders. If the judge in making this inquiry has learned of some previous crime which the defendant admits he has committed, can it for that reason be said that the sentence imposed upon the guilty person was due to prejudice and should be set aside? Surely a provision of the law which often results in mercy and leniency toward a first offender cannot be the cause of error in every case where the trial judge, in making this inquiry, finds that the defendant has committed other crimes of similar character. Such a construction would mean that hardened criminals and so-called 'repeaters' could hide behind their crime records, and that a judge, before pronouncing sentence upon them, would be powerless to inquire into their past records.

"In many decisions of other jurisdictions it has been held that, where the Court has discretion in fixing the punishment, it may consider the moral character of the accused, and such other evidence as it may deem necessary, as a guide in determining the punishment to be imposed (16 Corpus Juris, § 3065, p. 1297; State v Wilson, 121 N. E. 650, 28 S. E. 416; State v Wise, 32 Cr. 280, 50 P. 800, 801; State v Burton, 27 Wash. 528, 67 P 1097, 1099; State v Reeder, 79 S. C. 139, 60 S. E. 434, 14 Ann Cas. 968) and in considering evidence in aggravation or mitigation of the offense the court may consider many matters 'not admissible on the issue of guilt or innocence' (Toomer v State, 112 Md. 285, 76 A. 118)."

[fol. 118] To the same effect is Powell v. State, 94 Okl. Cr. 1, 229 P 2d 230, where it is said:

"Where the court has a discretion as to the character or the amount of punishment, it may be guided in the exercise of such discretion by accused's past record, by the motives actuating the crime, or by the fact that

accused previously has been convicted of a similar or other offenses."

In the body of the opinion citing 24 C. J. S. 1195, § 1980, it is further said:

"Justice generally requires consideration of more than the particular acts by which the crime was committed, and that there be taken into account the circumstances of the offense together with the character and propensities of the offender."

We can reconcile the logic of this contention only by entering the isolation booth of sheer ignorance as to all the facts of this case and by approaching the situation with an attitude which neither law nor justice require. The legislature placed no limitations in the statute, 21 O. S. 1951 § 745, the pertinent part of which reads as follows:

[fol. 119] "A. Every person who, without lawful authority, forcibly seizes and confines another, or inveigles or kidnaps another, for the purpose of extorting any money, property or thing of value or advantage from the person so seized, confined, inveigled or kidnaped, or from any other person, shall be guilty of a felony and upon conviction shall suffer death or imprisonment in the penitentiary not less than ten years."

To follow the defendant's contention would compel us to read into the statute elements which the legislature did not include. In truth, the legislature left the matter of imposition of the penalty in a case of kidnapping, where the plea is guilty, to the trial court and his sound discretion to be measured by the motive, the act, and its consequences. The reason for the lack of limiting provisions in the act are apparent. It was passed shortly after the Lindberg Law, 18 U. S. C. A. 1201, in 1935. It was intended as a strong deterrent against such criminality. But, unlike the Federal act, it did not impose such requirements as bodily injury or death as a condition for the imposition of the death penalty. Clearly, the legislature did not intend that the courts of [fol. 120] the State of Oklahoma should temporize with kidnappers. Neither did it intend that courts should temporize with habitual criminals. The statutes provide for enhanced

punishment for prior offenders. It is a fact that many of our most heinous crimes are committed by repeaters.

It is our sworn duty to uphold the law as written by the legislature. It is also our sworn duty to sustain the trial courts in the absence of error or abuse of discretion, neither of which we find in this record. We are concerned, herein, only with matters of law. Mercy, which this defendant did not extend to his victim, is within the power of the Pardon and Parole Board and the Governor. Art. 6, Sec. 10, Okla. Const.

This is not the first capital case in which the death penalty has been imposed on a plea of guilty. Ellis v State, 54 Okl. Cr. 295, 19 P. 2d 972, robbery with firearms; Martin v. State, 54 Okl. Cr. 336, 20 P. 2d 196, murder; In re Opinion of Judges, 54 Okl. Cr. 200, 16 P 2d 891, murder; Oliver et al v State, 55 Okl. Cr. 7, 23 P 2d 718, murder; and other cases. [fol. 121] We are therefore of the opinion that the penalty herein imposed, when considered under all the circumstances, is not disproportionate, and we are further of the opinion had the trial court not considered the murder of the victim as an indication of the intent of the kidnapper, he would have been derelict in his duty and recreant to society. The judgment and sentence is affirmed.

The original time for execution of judgment and sentence, herein, having expired due to the pendency of this appeal, it is considered, ordered, and adjudged that the judgment and sentence of the District Court of Tulsa County, Oklahoma, be carried out by the electrocution of this defendant on January 6, 1958.

Powell, J., concurs.

Nix, J., Dissents.

[fol. 122] Nix, Judge: Dissenting:

The Bill of Rights of our country provides in certain and concise language that no person shall be subject for the same offense to be twice put in jeopardy of life or limb. This sacred provision of our Constitution has been religiously adhered to since its ratification and adoption. One grain of dust chipped from this stalwart stone in our structure of laws would retard the progress of our jurisprudence beyond conception. In preserving these fundamental rights of our country, we must never permit that to be done indirectly which cannot be done directly.

Was the defendant sentenced to death in this case for the crime of murder, to which he had previously been convicted and sentenced to life, or was he sentenced to death for the crime of kidnapping? If the latter is true, the verdict should not be disturbed. If the former is true, the verdict should never stand. The hours of deliberation devoted to this question have been of a strenuous and trying nature. The paramount struggle has not been whether the defendant by creation of a sordid record has forfeited his [fol. 123] right to live. That which has deeply concerned your writer is whether we have toyed with the Bill of Rights so precious to all mankind. Have we, by permitting an individual to be thrice carved in order to obtain a desired result, flaunted the Constitution of our land? There is grave doubt in my mind. The defendant in this case was charged with three separate and distinct crimes, arising out of the same transaction—kidnapping, armed robbery, and murder. He accosted the deceased at an intersection in the city of Tulsa, got in the deceased's car and by aid of a pistol forced his victim to drive into Muskogee County. This consummated the act of kidnapping. During the course of travel, he took from the deceased $5.00 with which to buy gas. Thus the crime of armed robbery. The transaction ended with the defendant killing his prisoner, consummating the crime of murder. The defendant was apprehended and charged with murder. The case was set for trial and while the jury was in the process of being selected, the defendant withdrew his plea of not guilty. Upon a plea of guilty, the Honorable E. G. Carroll, a District Judge, with long experience and learned in the law, sentenced the defendant to serve the rest of his natural life in the state penitentiary at McAlester. No doubt Judge Carroll took [fol. 124] into consideration the hazards of a trial, relying for conviction almost exclusively upon a confession of the defendant, which would have been admissible only if voluntarily given. This no doubt gave the trial court much concern as was indicated in his remarks while passing sentence. He said:

> * * * This matter weighs heavily upon the shoulders of this Court. I want to do the right thing. I may be criticized for what I'm about to do, but it developed here today that to continue with a jury trial—I mean

that it would be a long, if orderly process; and I recall only recently that in a motion filed by you to suppress certain evidence that certain things, certain evidence has come to the attention of the Court which might have some mitigating circumstances in the penalty.

"There was a confession alleged. There's some testimony on the part of the defendant that to obtain that confession that you were probably slapped and beaten and probably kicked to bring you to the submission. During that motion I recall that there were some two confessions. One was never brought into court. It was destroyed, and what was in that confession this Court will never know, but the other confession was brought into court, and I read it, and I remember that you stated that it was obtained after you were bodily beaten."

[fol. 125] No doubt these statements were true as they were not challenged by the state. If they were true, the confession would not have been admissible and the state would have been tremendously handicapped in obtaining a conviction as the defendant was the sole surviving witness to the crime. However, this court is not herein charged to review the merits of this matter. The defendant had pled guilty to the crime of murder and received his punishment of life in the state penitentiary. Had the defendant received death, no doubt the present case would not be before this court and the crimes incident to the murder would have passed into oblivion and long since forgotten. Evidently other persons were not satisfied with this result and they chose to carve again. The defendant was brought back to Tulsa County where he was charged with armed robbery for which he was sentenced to 50 years in prison upon a plea of guilty; charged with kidnapping, pled guilty and received death in the electric chair; the desired results being obtained upon the third attempt.

A careful study of the proceedings in their entirety inevitably raises the question was defendant given the death penalty because he forced the deceased to drive into another [fol. 126] county at pistol point or was the death sentence imposed because he committed the heinous crime of murder to which he had already been convicted and sentenced to serve the balance of his life in prison? The trial judge, in

passing sentence upon the defendant for the crime of kidnapping, strongly indicated in his remarks that the crime of murder was deeply embedded in his mind and no doubt used to justify the extreme penalty. He said:

> "* * * The court has been very deliberate in the matter of this case, has given it hours of consideration, and investigation; investigation of your record, investigation of the facts which have been alleged, which have been stated, and which you admit were part of this crime which you have committed in Tulsa County, *which* resulted in the murder of the victim, Reverend Cook, to which you have pled guilty and been sentenced in Muskogee County, and which the court takes into consideration, *that murder as being a part and parcel of the crime which is here, as a continuing thing. It is the Court's opinion that there has never been in the history of Tulsa county, a More brutal, vicious crime committed, this crime to which you have pled guilty here.* The fact that you have pled guilty to the crime of murder in Muskogee County and received a life sentence there, is not a particularly or material consequence in the matter of the Court passing sentence in this case."

[fol. 127] It is made exceedingly clear by the temper of these remarks that the crime of murder was the predominating basis for the infliction of the death penalty. In alluding to the atrociousness of the crime, surely the trial judge had reference to murder and not kidnapping. The trial court, according to his remarks, gave hours of deliberation and investigation of the record showing facts resulting in *murder*, which was a part of the crime before the court. The court stated:

> "* * * there has never been in the history of Tulsa County a more brutal, vicious crime committed, *this crime to which you have pled guilty here.*

It is quite obvious that the trial judge did not have reference to the kidnapping, which in itself was not brutal or vicious, but to the murder committed in Muskogee County, with which we agree, as being brutal in its conception and vicious in its execution. I am inclined to agree with defend-

ant's counsel in their contention that the extent of punishment in the case at bar was received only as a result of the murder committed in Muskogee County and that murder constituted the prevailing factor in the minds of the county attorney and trial court.

[fol. 128] If the deceased had been taken to Muskogee by the defendant and released without harm, we can agree that the death penalty would have been excessive. The majority opinion in justifying the death penalty calls attention to the potential gravity of the crime of kidnapping by referring to such cases as Lindberg, Greenlease, Ross and other generally known to the average citizen. In each of these cases the victim was killed for which the defendant was given the extreme penalty. It is well to point out that these defendants were tried but one time, convicted one time and sentenced one time, though their crime was identical in nature with the case at bar. This is the first death case before this court as a result of kidnapping. Since statehood six cases have been decided by our court where defendants were charged with kidnapping. These cases are cited as follows along with the sentence imposed upon each defendant: Norris v State, 68 Okl. Cr. 172, 6 P 2d 540, 30 years; Shimley et al. v State, 87 Okl. Cr. 179, 196 P 2d 526, 3 years; Flowers v State, Okl. Cr 238 P 2d 841, 20 years; Williams v State, 96 Okl. Cr. 362, 255 P 2d 532, 20 years; Phillips v State, Okl. Cr. 267 P 2d 167, 20 years; and Ratcliff v State, Okl. Cr. 289, P 2d 152, 5 years.

[fol. 129] [File endorsement omitted]

IN THE CRIMINAL COURT OF APPEALS FOR THE STATE OF OKLAHOMA

No. A-12,467

EDWARD LEON WILLIAMS, Plaintiff in error,

vs.

STATE OF OKLAHOMA, Defendant in error

PETITION FOR REHEARING BY PLAINTIFF IN ERROR—Filed December 18, 1957

(Underscoring supplied by us)

Comes now the plaintiff in the above styled action which originated in the District Court of Tulsa County, and in which judgment and sentence were imposed on February 1, 1957, against plaintiff in error, sentencing said plaintiff in error to death by electrocution, being cause No. 16,911; upon which an appeal was perfected to this Court, and oral arguments were heard on July 17, 1957, and the opinion of this Court affirming the trial court's sentence was filed on December 4, 1957. The parties shall continue to be referred to in this petition for rehearing as they appeared in the trial court.

It is respectfully submitted that the Court's present opinion is in conflict with, and overlooks, certain prior decisions of this Court, and statutes of this State, and the controlling force and effect thereof, as hereinafter more fully set forth.

The very nature of a petition for rehearing makes it necessary to call attention to what we believe to be errors in the opinion as it presently stands. We wish to state that we have the very highest regard and respect for this Court and the Justices thereof. Of course, we realize that this present opinion is not yet the final opinion of this Court and we respectfully submit that the present opinion should not become the final opinion of this Court for the reasons hereinafter set forth.

We wish to present three principal points on which we feel the very ably Presiding Justice is in error in the opinion as written.

[fol. 130] *Point One, Misconstruction of statute.* The opinion after quoting 22 O.S. 1951 secs. 973-975 states:

> "* * * two things are clear under the provisions of #973. First, pursuing this *method of procedure* is a matter of the trial court's sound discretion. Second, its use is further contigent upon the request of either the state or the defendant. * * *
>
> "It is contended that under the provisions of #975 it is the mandatory duty of the court to hear witnesses. But, in construing secs. 974 and 975 in light of the provisions of sec. 973, we are of the opinion that both the provisions of sec. 974 and sec. 975 are contingent upon the request for evidence under the provisions of sec. 973, or it is within the trial court's discretion to pursue some other reasonable method."

We respectfully submit that this is a misconception and misconstruction of this statute. This construction by the writer of the opinion of these sections of the statute would clearly mean that under these statutes it is discretionary with the trial court to determine (1) whether it desires to hear any facts or evidence in mitigation or aggravation and, (2) if so as to what type of evidence the court may want to hear. We respectfully submit that the language of the statute unmistakably and clearly does not leave both of these matters to the discretion of the trial court. The language of the statute clearly leaves it in the discretion of the trial court whether it desires to hear *any* facts at all in mitigation or aggravation or not, but if the trial court in exercising that discretion decides to want to hear facts in evidence then the Legislature by clear wording has specified how and only how it shall hear such facts in evidence. The pertinent words of the statutes which spell this out are sec. 973:

> "* * * the court, upon the suggestion of either party that there are circumstances which may be properly taken into view, whether in aggravation or mitigation of the punishment, may in its *discretion hear* the same summarily at a specified time * * *"

This, of course, clearly says that the trial court may in its "discretion hear" or not hear circumstances in mitigation or aggravation, but there is no provision in this section as

to the type of evidence by which such circumstances may be shown. The very next section takes care of that. Sec. 974 provides:

> [fol. 131] "Section 974. The circumstances *must be presented* by the *testimony of witnesses* examined in open court, except that when a witness is so sick or infirm as to be unable to attend, his deposition may be taken by a magistrate of the county out of court, at a specified time and place, upon such notice to the adverse party as the court may direct."

There is not a hint in this section that the trial court has any discretion as to the *type* of evidence to be introduced to show circumstances in mitigation or aggravation. On the contrary this language could hardly be more specific that the evidence "must be presented by the testimony of witnesses in open court," etc. In other words, such circumstances must be introduced by competent evidence. In fact to make it crystal clear and doubly certain that such circumstances should not be considered except in the manner just provided, the Legislature added section 975, wherein they specifically said:

> "Section 975. No affidavit or testimony, or representation of any kind, verbal or written, can be offered to or received by the court or member thereof in aggravation or mitigation of the punishment, *except as provided* in the *last two sections.*"

How can there be any discretion in the trial court as to the type of evidence to be introduced in the face of these clear words?

Thus, we respectfully submit that the present opinion by inadvertence is clearly erroneous in holding that the trial court under the Oklahoma statute has any discretion as to the type of evidence which is admissible in mitigation or aggravation and the present opinion clearly should be modified on this point, otherwise it would amend and/or nullify the Oklahoma statutes.

Herren vs. State, 74 Okl. Cr. 432, 127 P. 2d 384, cited in the opinion, is in accord with the distinctions we have pointed out as to the discretion of the trial court, because it merely holds that if the court decides to hear any evidence in miti-

gation or aggravation the court can then determine "the extent of the inquiry". This in no way infers that the trial court in making such inquiry can hear any type of evidence other than the competent evidence prescribed by the above statutes.

No court has ever construed a statute such as ours to [fol. 132] hold as the present opinion holds that the trial court may in its discretion determine whether it is going to hear competent or incompetent evidence if it is going to hear any circumstances at all. The Illinois court, under a very similar statute, has held in accordance with our contention as set forth in our brief, People vs. Serrielle, 188 N.E. 375. It is apparent that the provisions of the Illinois statute *can* either be waived or circumstances stipulated to by counsel. We submit that the Illinois statute, opinion pg. 4, is not *more* mandatory than the Oklahoma statute, but it has two separate and distinct effects in that (1) it makes it mandatory in "all cases" where the court possesses any discretion in fixing the punishment, and (2) makes it mandatory in those cases to "examine witnesses as to the aggravation or mitigation". Therefore the Illinois statute is more mandatory than the Oklahoma statute only in the respect that it must hear competent witnesses in "all cases" where the court may determine the extent of punishment. In Oklahoma the trial court has discretion as to whether he will hear *any* such circumstances in aggravation or mitigation or not. But in neither Oklahoma nor Illinois is there any discretion as to the type of evidence that must be heard as *each* of the statutes requires "testimony of witnesses" to prove such circumstances. This is mandatory.

The learned Presiding Justice states, opinion pg. 5:

> "It is apparent that the defendant not only waived the provisions of 21 O.S. 1951 secs. 973-975, but he at no time intended to invoke said provisions for mitigation, * * *"

Certainly it is true that the State and the defendant *could* stipulate expressly, or through acquiescence in failing to object, and allow circumstances to be read or otherwise presented to the court not in accordance with the provisions of the Oklahoma statutes. This method is faster and is the procedure followed in the vast majority of cases by what

amounts to an agreement to do so. Such a procedure could certainly not be utilized in the face of objection as the defendant's counsel did in the present case. The fact that [fol. 133] the County Attorney of Tulsa County suggested to the Court that he had "typed up a brief statement of the facts" is sufficient suggestion to the Court to raise the provisions of secs. 973-975. Counsel for defendant objected and was granted a continuing objection to all of the County Attorney's ex parte statement, which objection was overruled and exception allowed. The Presiding Justice contends, then, that by the defendant's answer of "no sir" and "yes sir" and so on to particular questions by the trial court, he waives the objections previously entered on his behalf to the introduction of incompetent evidence and thus waives the provisions of secs. 973-975. The law on this question generally is as stated in 89 C.J.S. p. 504 and 505:

> "Error in the admission of evidence is not waived by conduct not amounting to an express or implied assent to the reception of the evidence. * * * The erroneous admission of evidence is waived by a subsequent withdrawal of objections thereto; but the waiver must be so specific as to leave *no doubt* on the subject, * * *."

It is difficult to understand how a defendant, with his very life hanging in the balance, can, in answering some pointed questions addressed to him by a trial judge, waive all his rights and waive all objections to a long hearsay statement which took many minutes to make, which took up several pages of the record, which was interspersed with oral argument, and which was made two or three days prior to the trial court's questions. As a matter of human nature, the tremendous pressure and tension of the situation made a short answer the least aggravating to the situation, but such an answer was made with the full understanding that the objections had been previously entered and made a matter of record to be considered by this Court. In Palmer vs. City of Long Beach, 33 Cal. 2d 134, 199 P. 2d 952, the Court states:

> "In view of an attorney's duty to his client, it should not lightly be assumed that he stipulated away his case. * * * Stipulations must be given a reasonable construction with a view to giving effect to the intent of

> the parties and 'the language used will not be so construed as to give it the effect of the admission of a fact obviously intended to be controverted or the waiver of a right not plainly intended to be relinquished. * * *'" (Citing many authorities.)

[fol. 134] And the court further states, quoting from another California opinion:

> "'* * * but there should be *no* sacrifice of substantial rights merely to subserve the constant importuning to speed up trials. The purpose of every trial is to examine into disputed facts. * * * Stipulations are ordinarily entered into for the purpose of avoiding delay, trouble, or expense. * * *.'"

This case was a civil suit and the language seems strong and clear. How much more important, then, is it in a criminal case, with a question of the defendant's life in the balance, to protect his *every* right and to *assume* no fact that prejudices him. This is so, in a capital case particularly, whether a man be on trial before a jury or in the process of being sentenced by the court. It must be clearly apparent from all that we have said above that the defendant certainly did not intend to waive or stipulate away any of his rights, and it is contrary to our civilized concept of fundamental justice and due process to hold otherwise.

The purpose of these statutes and these cases cited is to avoid sentences or death penalties that are unjust. A part of this purpose is that these cases and statutes were clearly intended as a safeguard to the individual, whatever his station in life and whatever his crime, from being denied a fair trial and a fair hearing prior to sentencing. These sections then are to protect the individual from the evils of incompetent evidence and from the evils of long ex parte statements which cause us to temporarily lose sight of legal concepts. The sentencing of any man, as much as possible, should have no element of passion or vengeance and should be immune from personal feeling.

In order to maintain the high national esteem in which this Court has been held since its inception, as noted by such famous scholars as Dean Wigmore, this part of the opinion certainly should not stand as written.

Point Two, Double punishment and denial of due process.

To reaffirm our contention that this case does involve the concepts of double punishment and denial of due process, we [fol. 135] wish to refer to the able dissenting opinion written by Justice Nix, and to our brief and reply brief as written.

The able writer of the opinion states, opinion pg. 6:

> "Therefore, there would not be such a thing as merger of these separate offenses. Furthermore Oklahoma does not recognize such doctrine. Burns vs. State, 72 Okl. Cr. 432, 117 P. 2d 155; McCreary vs. Venable, 86 Okl. Cr. 169, 190 P. 2d 467; State vs. Stout, 90 Okl. Cr. 35, 210 P. 2d 199."

Our careful examination of these cases discloses language as follows:

> "• • • we too would be bound by the authority of both the Taylor and Thomas cases had not Judge Doyle concurred in the case of Burns v. State, 72 Okl. Cr. 432, 117 P. 2d 155, in which a unanimous court agreed:
> "'The crime of conspiracy does not *merge* in the felonies described as overt acts in the indictment, where the conspiracy is a *crime* and *not an essential part of the felonies* to accomplish which the conspiracy was formed.'"
>
> —McCreary v. Venable, 190 P. 2d 467, 469.

This language is present in all three conspiracy cases and indicates that the doctrine of merger did not apply in those particular conspiracy cases, but that the doctrine would definitely apply where the above rule of law applies. These cases cite other cases on the same point. However none of the cases seems to conclude that the doctrine of merger is not recognized in Oklahoma. To the contrary, it seems apparent that the doctrine of merger was simply not recognized in those particular fact situations, but that the doctrine would be clearly recognized in this state under a proper fact situation. We respectfully submit that this present conclusion as to the doctrine of merger should be modified to avoid confusion and misunderstanding concerning this doctrine.

Point Three, The injustice which this Court has power and duty to correct. We realize that this Court cannot technically extend mercy, but it has the duty to see that *justice* is done.

22 O.S. 1957, sec. 1066, states:

> "The Appellate Court may reverse, affirm or *modify* the judgment appealed from, * * *"

In Methvin v. State, Okl. Cr., 60 P.2d 1062, 1070, an opinion by Justice Doyle, with reference to sec. 3204, St. 1931 (now 22 O.S. sec. 1066) states:

> [fol. 136] "In the case of Wilson v. State, 17 Okl. Cr. 47, 183 P. 613, 620, it is said:
>
> "'By this provision it seems to have been the intention of the Legislature to vest this court with power to modify the judgment, when such a course would be in *furtherance of justice* and conduce to the *humane administration* of the law. In a capital case it is the duty of this court to examine, with the greatest care, the whole record in *favor* of life, and review the case upon the merits to determine whether *justice* requires a modification of the judgment to imprisonment for life.' And see Fritz v. State, 8 Okl. Cr. 342, 128 P. 170; Anthony v. State, 12 Okl. Cr. 494, 159 P. 934; Owen v. State, 13 Okl. Cr. 195, 163 P. 548; Westbrook v. State, 14 Okl. Cr. 423, 172 P. 464; Chambers v. State, 16 Okl. Cr. 238, 182 P. 714; McConnell v. State, 18 Okl. Cr. 688, 197 P. 521; Young v. State, 19 Okl. Cr. 363, 200 P. 260; Phillips v. State, 27 Okl. Cr. 108, 225 P. 180.
>
> "The law regards human life as the most sacred of all interests committed to its protection; and no more solemn duty can be imposed upon the courts than the duty of protecting, and the duty of taking, human life. To take the life of a human being is an awful thing even when it is taken by the law in the due administration of justice."

Further cases reciting the power of this Court to modify sentences in the "furtherance of *justice*" are far too numerous to permit citation here. This is a salutary provision of the law and is a power which has been exercised many times by this Court throughout its distinguished history. This Court and the people of this State recognize the fundamental wisdom and truth of Daniel Webster's famous statement, "That the chief concern of man on earth is justice."

Justice, then, has to do with equality and well reasoned uniformity of treatment not only between different individuals but as to a single individual charged with different crimes growing out of the same criminal transaction.

The Presiding Judge in present opinion states, at page 7:

> "Yet, it is urged there is nothing particularly vicious in the single act of kidnapping. We might agree that contention possesses merit when the kidnapping is viewed as an isolated crime. But, the courts are not required to insulate themselves to facts clearly manifesting intent, and the ultimate consequences of criminal acts."

It is thus reasoned that the end result or consequence of the kidnapping here was the murder of the victim. However, the defendant has been sentenced on the "ultimate consequences of the criminal acts", namely, life imprison-[fol. 137] ment for murder. The learned writer of the opinion holds that the defendant should be punished by death for the kidnapping because such crime ended in murder and thus we would punish the defendant twice for the murder—the first time directly for murder (by life imprisonment and the second time indirectly via kidnapping by inflicting the death penalty. In other words the incidental offense is punished more than the principal offense. For this Court to permit two such unequal sentences to stand violates the most fundamental principle of fair play and justice—namely uniformity and equality in the administration of justice. No wonder numerous lawyers as well as laymen have remarked that "it just does not make sense to give the defendant life imprisonment for murder and death for kidnapping." Fortunately this Court has the power and the duty to correct errors of law and also such errors of injustice.

Injustice results when we consider the same murder twice because we "feel" a defendant simply *must* die upon the second consideration of the same murder if not upon the first. If such conduct was considered justice, then it would not be Christian or in keeping with the New Testament, upon which our conduct is based. The fact that the defendant perpetrated crime does not justify us in losing sight of the spirit of the law and what we call a civilized, Christian

"attitude". The law and courts of justice rise above the level of the conduct of criminal defendants and does not justify its judgments by their acts.

It would certainly be agreed that there is no more serious or aggravated crime than murder. A defendant thus charged with murder and kidnapping growing out of the same series of events would know that his most serious punishment would come for the murder. This is *reasonable*, and this is *just*. Therefore, when the trial court, after careful consideration, gives the defendant life imprisonment for the murder, the defendant, or any man, would consider that the punishment for the kidnapping would certainly *not* be any more than that given for the murder. This is in keeping with the equality and well reasoned uniformity in treatment [fol. 138] of a defendant that we speak of in the "furtherance of justice" and "the humane administration of the law." But, where a life sentence is inflicted for the murder, and the death penalty inflicted for the kidnapping, such conduct is *not* justice.

Any kidnapping has the element of desire to avoid detection, just as does any crime. Most of the kidnapping cases from this State involve threats to kill and firearms; therefore, they, too, had the intent to kill at some point in the kidnapping. Thus, by the reasoning in the opinion, *each* of these cases should have had the death penalty because of their intent to kill. If a murder had been perpetrated than *death* perhaps would have been a just punishment for the *kidnapping* in the absence of a *separate* prosecution for the murder. But the maximum sentence ever imposed in Oklahoma for kidnapping was *30* years. In the present case the defendant *was* punished separately for the murder. He *is* being punished separately for the kidnapping. The very able Trial Judge, District Court, Muskogee County, Hon. E. C. Carroll, considered that the murder began with a kidnapping and he further considered all the other facts and gave a *life* sentence for the *murder*. He considered the same circumstances in *aggravation* of the murder as the present trial court. The trial judge in the kidnapping case doubtless considered that the kidnapping ended in murder, but he should have *realized* that the defendant had been sentenced for the murder and that the other trial judge considered the kidnapping in his sentence in the murder case. The trial judge in the kidnapping case should have respected

and considered carefully the prior solemn judgment of a coordinate trial judge, one who is of equal rank and ability, and who had more actual, first-hand knowledge of the entire transaction. This is to say, that Judge Carroll *also* weighed the facts carefully, with great deliberation, with courage, and with justice in view. As Judge Carroll states (C.M. 51), "I want to do the right thing. I may be criticized for what I'm about to do,—." It might have been easier and more popular for Judge Carroll to give the death sentence. Judge [fol. 139] Carroll knew as we all do that the cry of unthinking people who do not have the direct responsibility to pass judgment, throughout the ages has always been "crucify him, crucify him."

In reviewing the six other kidnapping cases in this State (cited in defendant's brief), they are *each* and *all* for some dastardly purpose—robbery, rape, or to escape incarceration. All are potentially dangerous to the victim's life; most of such cases involve threats and use of firearms, and many such cases involved hardened criminals. Such a case would be Norris v. State, 68 Okl. Cr. 172, 96 P. 2d 540, where the defendant was charged with kidnapping, second and subsequent offense, since he had been previously convicted of robbery with firearms and murder in the first degree and another additional conviction of murder in the first degree. The jury in that case returned a term of 30 years in the penitentiary. Still, the maximum punishment for kidnapping in this State is *30* years; the average punishment for that crime is *16.3* years. Why do we profess to have cases for precedent to which we turn in advising a defendant? Or, to which a judge may turn in sentencing a man, to see what other wise judges have done with the same crime under similar circumstances?

The language of the Presiding Justice Brett in the case of State v. Stout, Okl. Cr., 210 P. 2d 199, 203, 204, sets forth with clarity and force our point:

> "Hence, the rule of stare decisis has long been recognized as the bulwark of American jurisprudence, * * *.
>
> "Such a ruling would do violence to our time-honored tradtion of trial courts' reliance on judicial opinions for guidance and freedom from error. It would place the mark of condemnation upon the trial judge who in the exercise of his bounden duty looked to the decisions

of the appellate court for guidance. It would tend to destroy the wholesome concept that this *is* a government of laws and not of men. It would tend to subject the citizen to the caprice of men and not of laws. It would create the possibility for political persecution through the abuse of judicial power by decree."

Attorneys and judges alike can and should consider prior decisions of the *courts* and *juries* of this State to see what they held to be a just punishment for kidnapping under various fact situations. The very cornerstones of "American [fol. 140] jurisprudence" are shaken if we cannot view those cases with faith in their validity. The purpose of law and justice is not to reflect the personal, individual, notion or concept of justice, but it is to reflect and represent the uniform and impersonal reasoning long established and upon which the courts, attorneys, and the people can rely. To hold otherwise would be an injustice and the denial of due process under the XIV Amendment.

Therefore we respectfully submit that to avoid injustice this Court should modify the present opinion so that the punishment inflicted for the kidnapping would not exceed the punishment inflicted for the murder.

Carefully considering the serious questions and doubts raised here, we respectfully urge that the present opinion be modified in each of the three aspects set forth above.

It is further respectfully urged that in view of the modifications we feel should be made to the present opinion, this Court also modify the sentence imposed.

Respectfully submitted, John A. Ladner, Jr., Fred W. Woodson, Jr., Paul Gotcher, Attorneys for Defendant. By (S.) John A. Ladner, Jr.

[fol. 140-a] [File endorsement omitted]

IN THE CRIMINAL COURT OF APPEALS OF THE STATE OF OKLAHOMA

No. A-12,467

EDWARD LEON WILLIAMS, Plaintiff In Error,

vs.

THE STATE OF OKLAHOMA, Defendant In Error

ORDER EXTENDING SENTENCE—January 2, 1958

Now, on this the 2nd day of January, 1958, it being shown to the court that a petition for re-hearing is now pending in the above styled and numbered cause and it further appearing that the date for the execution of the judgment and sentence of the district Court of Tulsa County, Oklahoma, is set for the 6th day of January, 1958, it is therefore ordered that the same is hereby stayed pending the determination of said petition for re-hearing, subject to the further order of this Court.

John A. Brett, Presiding Judge.

[fol. 141] [File endorsement omitted]

IN THE CRIMINAL COURT OF APPEALS OF THE STATE OF OKLAHOMA

No. A-12,467

EDWARD LEON WILLIAMS, Plaintiff In Error,

vs.

THE STATE OF OKLAHOMA, Defendant In Error

OPINION ON RE-HEARING—Filed February 5, 1958

BRETT, Presiding Judge:

After oral argument, it is felt that the matters urged on petition for rehearing have been fully treated in the majority opinion of this court, and the same is adhered to, and

the matters urged in the petition for rehearing are overruled and petition denied.

The time originally appointed for the execution of the defendant, Edward Leon Williams, having passed pending this appeal:

[fol. 142] It Is Ordered, adjudged and Decreed that the judgment and sentence of the district court of Tulsa County, Oklahoma, be carried out by the electrocution of the defendant, Edward Leon Williams, by the Warden of the Oklahoma State Penitentiary, McAlester, Oklahoma, on Tuesday, the 11th day of March, 1958.

Powell, Judge, concurs.

Nix, Judge, dissents.

POWELL, Judge, concurring:

The petition for re-consideration of the opinion promulgated herein on December 4, 1957, and for rehearing and filed in this court on December 18, 1957, was so forceful and the oral argument by John A. Ladner, Jr., Esq. (who did not represent defendant in the trial court), so arresting, that we have re-considered the opinion complained of. The record has been read and re-read, and all briefs re-read and the authorities studied. I have particularly restudied the opinion in light of the petition for re-hearing.

It should be made clear that when the district court of Tulsa County convened on January 30, 1957 there were two charges pending against the defendant, Case No. 16910, [fol. 143] being a charge of robbery with firearms, and where the maximum penalty was death (21 O. S. 1951 § 801); and case No. 16911, kidnapping, where likewise the maximum penalty was death.

The record discloses that a sentence of fifty years was imposed in the first case, and in the second punishment was imposed at death in the electric chair. The appeal is from the latter judgment.

As demonstrated by Judge Brett in his opinion, the confession of the offense charged subjects accused to the same punishment as if he were tried and found guilty by the verdict of a jury. In other words, the extent of the punishment, within the limits of the statute (21 O. S. 1951 § 745-A), was within the discretion of the trial judge.

Our duty from the record before us is to determine

whether or not the trial judge may have abused his discretion in the matter of the assessment of the extreme penalty.

A single and extreme illustration for clarity would be that if defendant had in his attempt to escape sought to get the kidnapped person to drive him to a local point and he had [fol. 144] refused, and defendant at gun point had taken the car and at some convenient place had forced defendant out of the car and at some convenience place had forced defendant out of the car without injury, and had used the car to get, say to the air port or railway station in effecting an escape, the infliction of the death penalty in such a case, I think all reasonable minds would agree, would be an abuse of discretion.

In the within case where the trial court could not become aware of the facts and circumstances in the within case, except what he may, in spite of himself, have heard from news casts and gleaned from headlines in the press, matters he is presumed to have disregarded,[1] if he had failed to follow the procedure outlined by 22 O. S. 1951 §§973-975 inclusive, or if such procedure was waived without any stipu- [fol. 145] lation or agreement as to the facts, it would be the idea of this writer that there would be nothing by way of a record to support the sentence imposed. Where there would be a trial and the court had heard evidence and the jury had found an accused guilty and left the assessment of the punishment to the court, under such circumstances, if neither the State nor the defendant requested opportunity to present further evidence in aggravation or mitigation, the court would have a basis in the record to guide him in the imposition of sentence, and there would be a basis for review by their court in case the accused should be dissatisfied with the amount of punishment assessed and appeal, as has been done.

The question here immediately forced, is whether or not the court erred by failure to require the State to produce testimony in support of the purported facts in the within case that the State had not been called on to prove by reason of the confession of the defendant, but which alleged facts were recounted to support the recommendation that

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[1] Harrison v. State, 95 Okl. Cr. 123, 240 P. 2d 459; Herren v. State, 74 Okl. Cr. 432, 127 P. 2d 384; People v. Riley, 376 Ill. 364, 33 NE 2d 872, 134 A.L.R. 1261.

the county attorney in conclusion made, as to the amount of punishment to be assessed.

[fol. 146] The statement of the county attorney prior to sentencing by the court has been detailed in Judge Brett's opinion. This statement was to cover both the armed robbery charge and the kidnapping charge. The court first considered the armed robbery charge, was advised by both counsel for the defendant and defendant himself that the accused wanted to withdraw the former plea of "not guilty" and enter a plea of "guilty". The court was careful to question defendant as to whether he had been induced by any promise of leniency to change his plea, and advised defendant that he might receive a death sentence, and defendant said that he understood that. Defendant wanted to waive the two days continuance for sentencing and have the sentence entered immediately. The court asked the county attorney if he had any statement or record he wished to make, and he answered to the effect that he would like for his statement to cover both the cases—armed robbery and kidnapping. The court then announced that before he would pass sentence in case No. 16910, that he would take a plea in case No. 16911. No objection was interposed to this procedure, so the court stated to the defendant that the county attorney [fol. 147] and defendant's counsel had advised the court that in case No. 16911, the kidnapping case where defendant had previously entered a plea of "not guilty", that he wished to withdraw such plea and enter a plea of "guilty". The court asked defendant if that was correct, and he answered, "Yes, sir", and the following then transpired:

"The Court: Now, you understand the nature of this charge, do you?

Mr. Williams: That's right.

The Court: You understand, that it is a charge that is punishable with the extreme penalty of life imprisonment, or death in the electric chair?

Mr. Williams: Yes, sir.

The Court: In light of that knowledge and information and understanding, you are entering this plea freely and voluntarily upon your part?

The Court: Has there been any representations made to you by counsel, or by anyone else, as to the

sentence which you might expect from the court in this case?

Mr. Williams: I was told I could expect the maximum.

The Court: Of death in the electric chair?

Mr. Williams: Yes, sir.

The Court: In light of that representation made to you by your counsel, you wish to withdraw your plea of not guilty and enter a plea of guilty to the charge?

[fol. 148] Mr. Williams: Yes, sir.

The Court: Upon your plea of guilty, charged with the crime of kidnapping as set forth in the information in case number 16011, the court finds you guilty of the crime and offense of kidnapping as set forth in the information. Do you have any statements you wish to make, or any legal reason to assign, why the court should not pass and impose sentence upon you, in accordance with your plea of guilty as charged?

Mr. Williams: No, sir.

The Court: As I told you in the other case, you have the right to have your sentence deferred for at least two days, by the court, before formal sentence is entered under your plea. You may waive that, however, and upon your request, the court may impose sentence immediately. What is your request?

Mr. Williams: That you impose sentence now.

The Court: At this time, without further delay?

Mr. Williams: Yes, sir.

The Court: Do you have any statement you wish to make as counsel for this defendant?

Mr. Woodson: I would rather reserve them if the court please.

The Court: Very well. Now, Mr. Simms, as representing the State, you say you have some record you wish to make?

Mr. Simms: If your Honor please, the position of the State will be explained to you by the County Attorney, Mr. Edmondson.

[fol. 149] The Court: Very well.

Mr. Edmondson: If the court please, I think that your Honor should be fully advised of the facts in this

case, before any recommendations should be made at all, as to the punishment, inasmuch as before your Honor appears only the informations charging each of these crimes, and the pleas of guilty which the defendant has made. Therefore, we have typed up a brief statement of the facts concerning both of these crimes and the actions of this defendant and the facts and circumstances that would be admissible in court on the trial of either of these cases, and rather than read the entire thing, I will make reference to it and then submit it to your Honor for reading it in detail, if that is the desire of the court.

The Court: I would prefer that you just read it.

Mr. Edmondson: All right, sir.

The Court: In its entirety, then we will have it before the court without further delay."

The county attorney then proceeded to make his statements, and when he had finished detailing the facts in the armed robbery case he continued to tell about the kidnapping that followed defendant's efforts to escape from the scene of the robbery.

[fol. 150] Mr. Woodson, counsel for the defendant, then interposed an objection to any statements by the county attorney as to the phases that followed the armed robbery. The court advised counsel that he was considering the statement as covering both cases, and counsel answered, "All right", but did except to the overruling of his objection.

The county attorney then completed the events happening from the moment of the kidnapping until the ministerial student was ejected from his car into the weeds with hands bound and shot to death. The following then transpired:

"Mr. Woodson: I would like again to interpose an objection here, that the defendant has pleaded guilty to two charges, one the armed robbery and one the kidnapping. The statements being made by the county attorney relate to another charge, that has been passed upon in another jurisdiction.

The Court: Well, I will consider it as the statement of the county attorney of course and as a continuing thing in the matter, which I think is proper to advise the court of all the facts surrounding the two crimes.

Of course, as far as the highjacking case is concerned. It might not at all be competent, but from the kidnap-
[fol. 151] ping standpoint it is, of course, a continuing thing, as long as he had the victim in his charge and under his control, I think all the facts pertinent to the incident are competent to the court and the court should know, so I will overrule your objection.

Mr. Woodson: Exception."

Counsel objected to the county attorney mentioning other crimes of defendant and the judge suggested to counsel that he would just give him an exception to the whole statement. When the county attorney completed his statement counsel for the defendant asked for and was granted a recess. After recess, counsel for the defendant asked for a limited number of minutes to make a statement for the defendant, but the court advised counsel to take all the time he wanted.

Much of counsel's statement was devoted to the thought that the State was seeking retaliation and revenge and he presented a thesis against capital punishment. In the course of his statement, counsel for defendant said:

[fol. 152] "In relation to the offense in Muskogee, in which he was charged with the crime of murder and there pleaded guilty, I should like to introduce the closing statements of the judge of that court in passing sentence upon the defendant, after he entered his plea of guilty and introduced the full context of it into the record."

The State offered no objection, and a transcript of the proceedings before the district court of Muskogee County, where the defendant had been charged with the murder that was the culmination of the kidnapping in question, was received in evidence. It was the argument that in that the record from Muskogee County disclosed that the district court there had assessed only a life sentence for the murder that was the culmination of the kidnapping, that the district court of Tulsa County would not be justified in imposing a greater penalty.

The district court of Muskogee County did not hear any evidence nor statements in aggravation or mitigation of the charge of murder where defendant had entered a

plea of guilty; so presumably he knew nothing of the facts of the charge. The court in his statement based his assessing the minimum penalty for murder of life imprisonment [fol. 153] on his thought that the Criminal Court of Appeals had never affirmed the death penalty where an accused had thrown himself on the mercy of the court and entered a plea of guilty. Judge Brett in his opinion has cited a number of cases where this court has approved sentences where the death penalty was assessed on a plea of guilty. Other cases could have been cited.

The court further reasoned that there might be reversible error in the record if a certain confession were offered and received in evidence; and that defense counsel claimed that some jurors had not left the court room the morning before defendant was handcuffed, and that they may have seen him handcuffed.

Of course whether or not there might be error in the record, after record made, would be for the appellate court to determine and such probable questions should have had no bearing on the determination of the amount of punishment to be imposed for the confessed murder. [fol. 154] The district court of Tulsa County no doubt pondered these things in resolving the contention that the action of the district court of Muskogee County should limit him in the sentence he might impose, and he refused to pass sentence immediately but set the case over for two days to February 1, 1957 at 9:30 a.m., at which time the following transpired:

> "By the Court: "Mr. Williams, you have heretofore appeared before this court, withdrew your plea of not guilty to the charge of robbery with firearms, as set out in the information, and entered your plea of guilty. You were advised of your rights in the matter. The court heard arguments in reference to the case, statement of facts were presented by the county attorney's office, the matter of formal sentencing was passed until this time at this hour, after the court found you guilty as charged in the information of the charge upon your plea of guilty. Now an intervention of time has come about since you entered your plea, and at that time, the court asked you if you had any statement to make or any legal cause why the court should not pass

sentence upon you, and you said you had none. The court in taking up the matter at this time, I will give you an opportunity to make any statement, if you have a statement you wish to make, or show any legal cause why the Court at this time should not pass judgment upon you, in accordance with your plea of guilty.

[fol. 155] Mr. Williams: "Well, one thing in the statement of facts, according——

The Court: "You understand this is only with the robbery with firearms charge, I am asking you now.

Mr. Williams: "Yes, sir. What I was going to say, according to the way Mr. Edmondson read the statement of facts, why I had been convicted before,—ph, the way he said, three times of armed robbery. Now, actually I only had one previous felony conviction.

The Court: And that was in——

Mr. Williams: "Indiana.

The Court "In Indiana, and you served a term for that?

Mr. Williams: "Yes, sir.

The Court: "Weren't you convicted of a charge in the Federal Court?

Mr. Williams: "Yes, sir, but that was a Federal Juvenile—Under the Federal Juvenile Delinquency Act.

The Court: "You did serve a term and did escape from the reformatory, did you not?

Mr. Williams: "No, sir, I don't know as you could call it an escape. I was working as a trusty up near Inglewood, and I just walked off.

[fol. 156] The Court: "With that correction of the statement of facts, do you have anything else that you wish to state at this time?

Mr. Williams: No, sir.

The Court: "What is your age?

Mr. Williams: "Twenty-seven."

The court next proceeded to pronounce judgment in case No. 16910; and then in case No. 16911 as follows:

"In case number 16911, State versus Edward Leon Williams, here charged with the crime and offense of kidnapping as set forth in the information. Upon

arraignment upon this charge, appearing before the district court, you entered a plea of not guilty. The case was thereafter set upon the trial jury docket of this court. At a date prior to the setting of this case, you appeared in this division of the district court, and before this court, and expressed your desire to withdraw your plea of not guilty and enter a plea of guilty to the charge of kidnapping as set forth in the information. You were represented by counsel at all times, and advised of all your legal and constitutional rights. Opportunity was given you and your counsel at that time, which was on Wednesday of this week, to make [fol. 157] any statement that you cared to make showing legal cause why judgment should not be pronounced and your punishment fixed by the court. Statements and arguments were made here in open court and made by the State and by your counsel in reference to the case, and in reference to the punishment. In this case, as in the other case upon which judgment has been passed by the court this morning, the court cognizant of the importance of the matter, and the seriousness of the charges, although you stated to the court that you were voluntarily making your pleas, without any influence being brought to bear upon you, or any promise of any results of the pleas, and stating you were cognizant of the facts, and had been informed that you might expect the extreme penalty in each and both of these cases, and that you were voluntarily making your plea of guilty to the charge. The court at that time passed the matter for sentencing until this morning to give all parties an opportunity for deliberating upon the matter. You come here at this time for formal sentencing under the judgment of the court which was entered on Wednesday, finding you guilty of the crime and offense of kidnapping as set forth in the information.

"Do you have anything further to state at this time, [fol. 158] or any legal cause to show to the court, why the court should not fix and assess your punishment upon your plea of guilty to the charge of kidnapping as set forth in the information?

Mr. Williams: "No, sir.

The court: "Now, at that time on Wednesday, there was a statement of facts made by the State relative to this case, and the sequence of events and the facts surrounding the sequence of events and the facts surrounding the commission of this crime. Do you have any correction to make in reference to the statement of counsel for the State, in that regard?

Mr. Williams: "No, sir."

The Court: "Those facts were true?

Mr. Williams: "Yes, sir.

The Court: "And you at this time admit that they were true and that you committed the acts as set forth by the State, that is correct, is it?

Mr. Williams: "Yes, sir.

The Court: "All right. Do you have anything further to say on behalf of this defendant?

Mr. Woodson: "Nothing further."

[fol. 159] It is vital to note (1) that counsel for the defendant did not object to the procedure followed by the court in his determination of the sentences to be imposed in the two cases before him where the defendant had entered pleas of guilty; (2) that the only objections interposed by counsel for the defendant to the matters outlined and recounted by the county attorney to the court, and which he stated in effect was an outline of facts that would be admissible in evidence on trial, were objections in the armed robbery charge of a consideration of any of the facts involving the kidnapping case, and then in the kidnapping case to a consideration of what happened in Muskogee County at the termination of the kidnapping. The court ruled in favor of defendant's objection as to the armed robbery charge, but ruled that he had a right in fixing punishment in the kidnapping case, to consider all the facts from the beginning to the end of the kidnapping, which would include the fact of murder to which the defendant had previously plead guilty: (3) after the county attorney completed his statement of the purported facts counsel for the defendant [fol. 160] made a lengthly statement of the purported fact, but sought to show that the district court of Muskogee County for the death of the kidnapped victim, had assessed only the minimum penalty of life imprisonment, and wanted

the court to consider the reasons assigned by the judge, and there was received in evidence the record made at time of imposition of sentence in Muskogee County, which had been heretofore outlined. After defense counsel's statement the court adjourned until February 1, 1957 at 9:30 a.m. for pronouncing sentence in the two cases.

On reconvening on February 1, 1957, the court asked defendant if he had any corrections to be made in the statements made by Mr. Edmondson, county attorney, and he claimed that he had previously served only one felony charge; that his other crimes were committed when he was a minor and that he was prosecuted under the Federal Juvenile Delinquency Act. The court accepted the corrections. The court then repeatedly asked the defendant as to the correctness of the statement made by the county attorney as to the purported facts, and defendant in effect stated the county attorney's statement was a truthful statement of the sequence of events and facts surrounding the commission of the crime. This was equivalent to a stipulation.

[fol. 161] Under the circumstances recounted, I agree that it was not necessary for the State to put on evidence in proof. The crime was admitted, and the circumstances surrounding the commission thereof were admitted, so to call witnesses and offer proof would be just taking up the time of the court to prove something where no proof was required.

The crimes of kidnapping, 21 O. S. 1951 § 745, and of murder 21 O. S. 1951 §§ 701, 707, are separate offenses, with jurisdiction in two separate courts. The action of the district court of Muskogee County, acting first, did not bind the district court of Tulsa County, where the maximum sentence in each charge was the same, but where the first court had failed to assess such sentence. It was the duty of the district court of Tulsa County to consider the background of the defendant, the probabilities of rehabilitation, and all the facts and circumstances surrounding the kidnapping. The court had to satisfy his own mind and conscience as to the penalty to be assessed, and the court was certainly interested in the question of whether the kidnapping victim was ever liberated, and if so, if he was unharmed. The record showed that he was marched out

with hands bound and shot and abandoned, thus his soul liberated to his Maker, and his body to the earth.

[fols. 162-169] It is concluded that the extent of the punishment within the limits of the statute, was within the discretion of the trial judge, and no abuse of such discretion is apparent. I discover no violation of due process.

The record does not justify further consideration of the question of double jeopardy than has been treated by Judge Brett. Such question was not raised in the trial of the case.

Subject to the thoughts expressed and with all respect to the dissent by Judge Nix, I reiterate my concurrence in the opinion promulgated by Judge Brett.

[fol. 170] [File endorsement omitted]

IN THE CRIMINAL COURT OF APPEALS OF THE STATE OF OKLAHOMA

No. A-12,467

EDWARD LEON WILLIAMS, Plaintiff In Error

vs.

THE STATE OF OKLAHOMA, Defendant In Error

ORDER DENYING SECOND PETITION FOR REHEARING—February 26, 1958

Now on this the 26th day of February, 1958, there having been presented to this Court plaintiff in error's application for leave to file second petition for rehearing, and the same having been fully considered and the Court being well advised in the premises, it is hereby ordered that the same be denied, to which Judge Nix dissents.

It is further ordered that the date of execution should be and is hereby stayed pending the further order of this Court for the reason the plaintiff in error has the statutory right to appeal this Court's decision to the Supreme Court of the United States by filing notice of such intention within fifteen days of the date of this order with the Clerk of this Court, subject to the further order of this Court as may be appropriate in the premises, and for the further reason

this Court is desirous that the plaintiff in error be accorded the full process of the law by reason of the gravity of the punishment imposed.

John A. Brett, Presiding Judge.

[fol. 171] [File endorsement omitted]

IN THE CRIMINAL COURT OF APPEALS, STATE OF OKLAHOMA

No. A-12467

EDWARD LEON WILLIAMS, Appellant,

vs.

STATE OF OKLAHOMA

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES OF AMERICA—filed March 10, 1958

I

Notice is hereby given that Edward Leon Williams, the appellant named above, hereby appeals to the Supreme Court of the United States from the final order and decision of the Criminal Court of Appeals of the State of Oklahoma affirming judgment of conviction and sentence to death by electrocution filed and entered in the District Court of Tulsa County, State of Oklahoma, entered herein on the 26th day of February, 1958. The decision or opinion of the Criminal Court of Appeals of the State of Oklahoma affirming the judgment of conviction after a plea of guilty and the defendant being thereupon sentenced to death was entered by said Court (as yet unreported in official state reports). Thereupon, timely petition for a rehearing was filed and the same was denied and thereupon application for leave to file second petition for rehearing was made on February 26, 1958, and said leave to file said application was ordered denied. That in the order denying leave to file second petition for rehearing stay of execution was ordered until further order of the Criminal Court of Appeals of the State of Oklahoma.

This appeal is taken pursuant to 28 U.S.C., Section 1257 (1)(2).

Appellant was convicted of the crime of kidnapping in violation of 21, Oklahoma Statutes 1951, Section 745; was sentenced to death by electrocution and is presently confined at the Oklahoma State Penitentiary, McAlester, Oklahoma, awaiting execution of the sentence so imposed and affirmed.

[fol. 172]

II

The Clerk will please prepare a transcript of the record in this cause, for transmission of the record to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

A. Notice of appeal to the United States Supreme Court.

B. Affidavit in forma pauperis.

C. Case-made prepared by the Court Reporter of the District Court of Tulsa County, Oklahoma, filed in this Court in support of State appeal.

D. Opinion and decision rendered by the Criminal Court of Appeals of the State of Oklahoma in this cause, together with the dissenting opinion thereto.

E. Petition for rehearing.

G. Order denying application for leave to file second petition for rehearing.

III

The following questions are presented by this appeal:

A. Under provisions of Federal and Oklahoma Constitutions, appellant cannot be twice put in jeopardy, that is to say, twice lawfully punished for same offense. Appellant, in a connected series of events, committed the crime of murder and kidnapping. Appellant was first convicted of murder and sentenced to life imprisonment in one State jurisdiction and subsequently was charged with the crime of kidnapping in another State jurisdiction and, upon a plea of guilty, was sentenced to death, and appellant contends that the latter sentence imposed was not for the offense of kidnapping but based wholly upon the crime of murder for which he had theretofore been sentenced.

B. Appellate and trial courts' erroneous application of State Statutes 21, Oklahoma Statutes 1951, Sections 973, 974, and 975 to the evidence in this case was highly prej-

udicial to appellant and in violation of the fundamental "law of the land" insofar as this appellant was affected.

Edward Leon Williams, Appellant.

[fol. 173-175] John A. Ladner, Jr., Tulsa, Oklahoma; Fred Woodson, Jr., Tulsa, Oklahoma; Anthis & Gotcher, Muskogee, Oklahoma; By Paul Gotcher, Attorneys for Appellant.

Proof of Service (omitted in printing)

[fol. 176] [File endorsement omitted]

In the Criminal Court of Appeals of the State of Oklahoma

No. A-12,467

Edward Leon Williams, Plaintiff in Error,

vs.

The State of Oklahoma, Defendant in Error

Order to Have Record Prepared at the Expense of State—March 13, 1958

Whereas, plaintiff in error in the above styled and numbered cause has given notice of his intention to appeal to the Supreme Court of the United States from a decision of this Court rendered on December 4, 1957, and made final on February 26, 1958, and

Whereas, plaintiff in error has filed an affidavit that he is a poor person and without funds with which to pay the costs of said appeal:

It Is Hereby Ordered, Adjudged, and Decreed that the record of the proceedings in the above styled and numbered cause be prepared at the expense of the State of Oklahoma

and made available to said plaintiff in error for purposes of said appeal.

Done this 13th day of March, 1958.

John A. Brett, Presiding Judge. (Seal.)

[fol. 176a] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 177] IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1957

No. 790 Misc.

[Title omitted]

On petition for writ of Certiorari to the Criminal Court of Appeals of the State of Oklahoma.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND PETITION FOR WRIT OF CERTIORARI—June 23, 1958

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for a writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 1090.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1958 477870 587

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 124

EDWARD LEON WILLIAMS,

Petitioner,

vs.

THE STATE OF OKLAHOMA.

ON WRIT OF CERTIORARI TO THE CRIMINAL COURT OF APPEALS OF THE STATE OF OKLAHOMA

BRIEF OF PETITIONER

EDWARD LEON WILLIAMS,
written by: JOHN A. LADNER, JR.,
309 Kennedy Bldg.,
Tulsa, Oklahoma.

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THE STATE OF OKLAHOMA.

ON WRIT OF CERTIORARI TO THE CRIMINAL COURT OF APPEALS OF THE STATE OF OKLAHOMA

BRIEF OF PETITIONER

Citation of State Reports

Edward Leon Williams vs. State of Oklahoma, No. A-12467, Criminal Court of Appeals of Oklahoma, December 4, 1957; rehearing denied, February 5, 1958; second petition for rehearing denied, February 26, 1958. Okla. Cr., 321 P. 2d 990-1008.

(All italics are by counsel for petitioner.)

Grounds of Jurisdiction

The basis for jurisdiction in this Court is Title 28 U.S.C. sec. 1257(3); petition for certiorari filed May 22, 1958; certiorari granted June 23, 1958, —— U.S. ——, 2 L.ed. 2d 1369. Petition for writ of certiorari filed with the Clerk of this Court within ninety days after entry of final judgment in the Criminal Court of Appeals of Oklahoma.

Constitutional Provision and Statutes

Amendment Fourteen to the Constitution of the United States,

> Section 1: " * * * nor shall any state deprive any person of life, liberty, or property, without due process of law; * * * "

Oklahoma Statutes, 1951:

> Title 21, sec. 745 (Vol. 1, page 1169): "Kidnapping for purpose of extortion—Assisting in disposing, receiving, possessing or exchanging money or property received.—A. Every person who, without lawful authority, forcibly seizes and confines another or inveigles or kidnaps another, for the purpose of extorting any money, property or thing of value or advantage from the person so seized, confined, inveigled or kidnaped, or from any other person, or in any manner threatens either by written instrument, word of mouth, message, telegraph, telephone, by placing an ad in a newspaper, or by messenger, demands money or other thing of value, shall be guilty of a felony, and upon conviction shall suffer death or imprisonment in the penitentiary, not less than ten years."
>
> Title 21, sec. 701 (Vol. 1, page 1165): "Murder defined.—Homicide is murder in the following cases.

"1. When perpetrated without authority of law, and with a premeditated design to effect the death of the person killed, or of any other human being.

"2. When perpetrated by any act imminently dangerous to others and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual.

"3. When perpetrated without any design to effect death by a person engaged in the commission of any felony. R.L. 1910, sec. 2313."

Title 22, sec. 973 (Vol. 1, page 1307): "Court may hear further evidence, when.—After a plea or verdict of guilty in a case where the extent of the punishment is left with the court, the court, upon the suggestion of either party that there are circumstances which may be properly taken into view, either in aggravation or mitigation of the punishment, may in its discretion hear the same summarily at a specified time and upon such notice to the adverse party as it may direct. R.L. 1910, sec. 5954."

Title 22, sec. 974 (Vol. 1, page 1307): "Testimony.—How presented—Deposition of sick or infirm witness.—The circumstances *must be presented by the testimony of witnesses* examined in open court, except that when a witness is so sick or infirm as to be unable to attend, his deposition may be taken by a magistrate of the county out of court, at a specified time and place, upon such notice to the adverse party as the court may direct. R.L. 1910, sec. 5955."

Title 22, sec. 975 (Vol. 1, page 1307): "Other evidence in aggravation or mitigation of punishment prohibited.—No affidavit or testimony, or representation of any kind, verbal or written, can be offered to or

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> Title 21, sec. 745 (Vol. 1, page 1169): "Kidnapping for purpose of extortion—Assisting in disposing, receiving, possessing or exchanging money or property received.—A. Every person who, without lawful authority, forcibly seizes and confines another or inveigles or kidnaps another, for the purpose of extorting any money, property or thing of value or advantage from the person so seized, confined, inveigled or kidnaped, or from any other person, or in any manner threatens either by written instrument, word of mouth, message, telegraph, telephone, by placing an ad in a newspaper, or by messenger, demands money or other thing of value, shall be guilty of a felony, and upon conviction shall suffer death or imprisonment in the penitentiary, not less than ten years."
>
> Title 21, sec. 701 (Vol. 1, page 1165): "Murder defined.—Homicide is murder in the following cases.

"1. When perpetrated without authority of law, and with a premeditated design to effect the death of the person killed, or of any other human being.

"2. When perpetrated by any act imminently dangerous to others and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual.

"3. When perpetrated without any design to effect death by a person engaged in the commission of any felony. R.L. 1910, sec. 2313."

Title 22, sec. 973 (Vol. 1, page 1307): "Court may hear further evidence, when.—After a plea or verdict of guilty in a case where the extent of the punishment is left with the court, the court, upon the suggestion of either party that there are circumstances which may be properly taken into view, either in aggravation or mitigation of the punishment, may in its discretion hear the same summarily at a specified time and upon such notice to the adverse party as it may direct. R.L. 1910, sec. 5954."

Title 22, sec. 974 (Vol. 1, page 1307): "Testimony—How presented—Deposition of sick or infirm witness.—The circumstances *must be presented by the testimony of witnesses* examined in open court, except that when a witness is so sick or infirm as to be unable to attend, his deposition may be taken by a magistrate of the county out of court, at a specified time and place, upon such notice to the adverse party as the court may direct. R.L. 1910, sec. 5955."

Title 22, sec. 975 (Vol. 1, page 1307): "Other evidence in aggravation or mitigation of punishment prohibited.—No affidavit or testimony or representation of any kind, verbal or written, can be offered to or

received by the court or member thereof in aggravation or mitigation of the punishment, *except as provided in the last two sections.* R.L. 1910, sec. 5956."

Question for Review

Petitioner pled guilty to the charge of murder in Muskogee County, Oklahoma, and was *sentenced to life* in the penitentiary for that crime; at a subsequent date, in Tulsa County, Oklahoma, petitioner pled guilty to the charge of kidnapping the same victim whom he had murdered as a result of the kidnapping and was sentenced to *death* for the kidnapping. Under the facts and circumstances of this case, was the petitioner denied fundamental fairness and justice under Due Process of Law in the following respects:

(1) Petitioner has been twice placed in jeopardy of his life and twice punished for the same offense in that:

(a) Conviction of murder is a complete bar to prosecution for the kidnapping, or

(b) To the extent that the sentence in the kidnapping prosecution is based upon the murder, it is a double punishment for the murder.

(2) The doctrine of *res judicata* precludes a reconsideration of the murder in the punishment for kidnapping.

(3) The trial court considered highly prejudicial, unsworn, hearsay statements to inflict the death penalty.

(4) The death penalty is disproportionate, unreasonable, and fundamentally unfair as the punishment for kidnapping in this case.

Statement of Case

On June 17, 1956, petitioner was charged in the District Court of Oklahoma within and for Muskogee County, Case No. 9658, with the murder of one Tommy Robert Cooke, on June 17, 1956, in Muskogee County, Oklahoma. On November 19, 1956, petitioner pled guilty in said case to the murder of Tommy Cooke (R. 22) and the Trial Court, after reviewing the case, there sentenced petitioner to life imprisonment in the State penitentiary for said murder (R. 22). The Court in Muskogee County had appointed Mr. Paul Gotcher to represent petitioner as a pauper.

One month after being sentenced for the murder, on December 17, 1956, in the District Court of Oklahoma within and for Tulsa County, two additional charges were filed: one, Case No. 16910, charged petitioner with Robbery with Firearms on June 16, 1956 (R. 3), the victim being one Claudie Kirk, and the second, Case No. 16911, charged petitioner with Kidnapping on June 17, 1956, the victim being the same Tommy Robert Cooke (R. 3). The Trial Court at petitioner's arraignment on December 19, 1956, assigned Fred Woodson, Public Defender, to represent petitioner on both charges and petitioner entered pleas of not guilty to both of said charges on said date (R. 4).

On January 30, 1957, petitioner withdrew the former pleas of not guilty and entered a plea of guilty to both charges and upon a finding of guilty the Trial Court heard statements and arguments on behalf of the State and the petitioner (R. 5 and 6-26). The record of the court proceedings after petitioner entered his plea of guilty in Muskogee County to the murder of Tommy Cooke was also introduced into evidence in the Trial Court in Tulsa County in the hearing on January 30, 1957, to determine the sentence to be imposed upon petitioner for the kidnapping of Tommy Cooke (R. 21-25).

On February 1, 1957, the Court entered judgment and sentenced petitioner to fifty years in the penitentiary in Case No. 16910, Robbery with Firearms, and sentenced petitioner to death in the electric chair in Case No. 16911, Kidnapping (R. 5 and 27-32). Thereupon, petitioner, through his counsel, gave notice in open court of his intention to appeal, in the Kidnapping Case only, to the Criminal Court of Appeals of the State of Oklahoma (R. 31). Thereafter, on February 19, 1957, petitioner filed a motion for new trial and asking the trial court to vacate its judgment and sentence in the kidnapping case, and to permit withdrawal of his plea of guilty (R. 33), and the Trial Court upon hearing said motion on March 1, 1957 (R. 34-37), overruled it and an exception was taken to said ruling and notice of appeal given on the judgment and sentence and the ruling on the motion (R. 38).

Thereafter, briefs were filed with the Criminal Court of Appeals of the State of Oklahoma; oral arguments were heard by that Court and on December 1, 1957, the Criminal Court of Appeals, being the court of last resort in Oklahoma in criminal cases, consisting of only three Judges, by a two-to-one decision with a majority and a minority opinion affirmed the Trial Court's sentence of death in the electric chair for the crime of kidnapping (R. 40-50).

A Petition for Rehearing (R. 55-66) was filed in the Criminal Court of Appeals by petitioner on December 18, 1957, and oral arguments heard on that petition on January 16, 1958. An order overruling the petition for rehearing was filed February 5, 1958, two Justices concurring, one dissenting (R. 67-68), and a special concurring opinion was written (R. 68-79).

A second petition for rehearing was filed and thereafter denied on February 26, 1958, by a two-to-one order (R. 79-80), and time was granted to file appeal in this Court.

Notice of appeal was filed by petitioner in the Criminal Court of Appeals on March 19, 1958 (R. 80-82). A petition for a Writ of Certiorari was filed by petitioner to this Court and this Court granted Writ of Certiorari on June 23, 1958, No. 790, Miscellaneous, now No. 124, October, 1958.

The Criminal Court of Appeals has entered orders staying the execution of petitioner, the last of which was filed February 26, 1958, pending further orders and the determination of proceedings in this Court (R. 79-80).

Summary of Argument

Due Process under the Fourteenth Amendment requires that every stage of criminal proceedings be guarded by fair dealing, fundamental fairness, and the principles of justice regardless of who the defendant is or the crime committed.

To subject petitioner to a conviction for murder and subsequently subject petitioner to a prosecution for kidnapping of the same victim, and as a part of the same continuing criminal transaction, where such kidnapping prosecution is to insure for the State that petitioner give up his life, such multiple prosecutions for retribution are a violation of Due Process.

Petitioner has been placed in double jeopardy for his life and subjected to double punishment for the same offense. Once petitioner has been convicted of murder, he cannot be prosecuted for the kidnapping of the same victim as a part of the same continuing criminal offense. The doctrine of double jeopardy prevents petitioner from being twice convicted for the same criminal offense.

Further, petitioner has been twice punished for the murder since the death penalty was assessed in the present

shocking that our polity will not endure it? Does it violate those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions?' Hebert v. Louisiana, 272 U.S. 312, 71 L.ed. 270, 47 S.Ct. 103, 48 A.L.R. 1102, supra. The answer surely must be 'no.' What the answer would have to be if the state were permitted after a trial free from error to try the accused over again or to bring another case against him, we have no occasion to consider."

This Court in *Rochin* v. *California*, 342 U.S. 165, 168-169; 96 L.ed. 183, 188, states:

"* * * Broadly speaking, crimes in the United States are what the laws of the individual States make them, subject to the limitation of Art. 1 §10(1), in the original Constitution, prohibiting bills of attainder and ex post facto laws, and of the Thirteenth and Fourteenth Amendments.

"These limitations, in the main, concern not restrictions upon the powers of the States to define crime, except in the restricted area where federal authority has preempted the field, but restrictions upon the *manner* in which the States may enforce their penal codes. * * *

"However, this Court too has its responsibility. Regard for the requirements of the Due Process Clause 'inescapably imposes upon this Court an exercise of judgment upon the *whole course* of the proceedings (resulting in a conviction) in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses.' Malinski v. New York, supra (324 U.S. at 416, 417, 89 L.ed. 1039, 65 S.Ct. 781). These standards of

justice are not authoritatively formulated anywhere as though they were specifics. Due process of law is a summarized constitutional guarantee of respect for those personal immunities which, as Mr. Justice Cardozo twice wrote for the Court, are 'so rooted in the tradition and conscience of our people as to be ranked as fundamental,' Snyder v. Massachusetts, 291 U.S. 97, 105, 78 L.ed. 674, 677, 54 S.Ct. 330, 90 A.L.R. 575, or are 'implicit in the concept of ordered liberty.' Palko v. Connecticut, 302 U.S. 319, 325, 82 L.ed. 288, 292, 58 S.Ct. 149."

This Court in *Brock* v. *North Carolina*, 344 U.S. 424, 427, 429; 97 L.ed. 456, 459 states:

"• • • As in all cases involving what is or is not due process, so in this case, no hard and fast rule can be laid down. The pattern of due process is picked out in the *facts and circumstances* of each case.

"• • • The conflicting views expressed in Ex parte Lange (see cases cited in opinion) indicate the subtle technical controversies to which the provision of the Fifth Amendment against double jeopardy has given rise. Implications have been found in that provision very different from the mood of *fair dealing and justice* which the Fourteenth Amendment exacts from a State in the prosecution of offenders. A State falls short of its obligation when it callously subjects an individual to successive retrials on a charge on which he has been acquitted or prevents a trial from proceeding to a termination in favor of the accused merely in order to allow a prosecutor who has been incompetent or casual or even ineffective to see if he cannot *do better a second time.*"

and at 344 U.S. 435, Mr. Chief Justice Vinson, dissenting, states:

"While the technical ramifications evolved in the many jurisdictions as part of the doctrine of double jeopardy do not fall within the scope of due process, the basic idea is part of our American concept of fundamental fairness."

In *Hoag* v. *New Jersey*, 356 U.S. ——, 2 L.ed. 2d 913, 917, this Court said:

"But even if it was constitutionally permissible for New Jersey to *punish* petitioner for each of the four robberies as separate offenses, it does not necessarily follow that the State was free to *prosecute* him for each robbery at a different trial. The question is whether this case involved an attempt 'to wear the accused out by a multitude of cases with accumulated trials.' Palko v. Connecticut, supra (302 U.S. at 328).

"We do not think that the Fourteenth Amendment *always* forbids States to prosecute different offenses at consecutive trials even though they arise out of the same occurrence. The question in any given case is whether such a course has led to fundamental unfairness."

"In the last analysis, a determination whether an impermissible use of multiple trials has taken place cannot be based on any overall formula. Here, as elsewhere, 'The pattern of due process is picked out in the facts and circumstances of each case.' Brock v. North Carolina, 344 U.S. 424, 427, 428, 97 L.ed. 456, 460, 73 S.Ct. 349."

As we stated before, these cases cited from this Court are presented without special regard to their absolute applicability on points of fact, but these cases set forth the principles of Due Process under the Fourteenth Amendment.

Furthermore, these cases arose through criminal proceedings by the state courts and therefore have as their source of jurisdiction in this Court the Due Process Clause. It is clear that Due Process of Law under the Fourteenth Amendment has no set pattern but depends upon the facts and circumstances of each case, and is based upon fundamental fairness and justice.

It is interesting to note, the Oklahoma Criminal Court of Appeals has an excellent history of understanding and sound interpretation of Due Process of Law. Shortly after statehood, Presiding Justice Furman wrote an opinion for the Criminal Court of Appeals in which it clearly establishes a pattern of thought on Due Process, both under the Oklahoma and the Federal Constitution. That Court in *Anderson* v. *State*, 8 Okla. Cr. 90, 126 P. 840, 846 then said:

> "An entirely satisfactory definition of 'due process of law,' which would be applicable to and include all cases alike, cannot be easily stated. In criminal cases in a state court, 'due process of law' means a trial in a court of competent jurisdiction before an impartial judge and jury or before a judge alone, upon an accusation, either by indictment or information, as the state may provide, charging the accused with the violation of some state law, of which accusation the accused must have notice in time to enable him to prepare for trial. This trial must proceed according to the established procedure or rules of practice in such state applicable to all such cases. In other words, a defendant must have his day in court. The admission of evidence for or against the accused must be according to the established rules in such state in all such cases, and the punishment inflicted must be authorized by law."

And, in *Ex parte Hollins*, 54 Okla. Cr. 70, 14 P. 2d 243, 246, the defendant pled guilty to the charge of rape by force

and the Trial Court sentenced him to death. After reviewing the obviously inadequate procedure of the Trial Court, the Criminal Court of Appeals stated:

> "No more solemn duty can be imposed upon the court than the duty of protecting and the duty of taking human life. When life is to be taken under the judgment of a court, the act cannot be justified, except by the *strict observance* of the forms of the *law of the land.* No act which a court can be called upon to perform is more grave and solemn than to pronounce judgment and sentence upon a plea of guilty in a capital case."

Thus, Due Process has its origins in the history of man's struggle against the state and oppressive powers in whatever form. Due Process is no respecter of persons, applying its protection, when proper, not only to the rights of the innocent but as well to those who are guilty of heinous crimes. In the present case it is as though the State was *not satisfied* that petitioner should receive a life sentence for the crime of murder, and therefore the State in all its power tried the petitioner again for a crime against the same victim as was murdered previously. The second charge brought against petitioner was kidnapping, which crime was a part of the same continuing criminal transaction as the murder, and on the second try, the State succeeded in its efforts to make certain that the petitioner pay to society with his life. It is a type of *complete retribution* in which the results achieved by the State are, under the facts and circumstances of this case, so fundamentally unsound, unfair, and arbitrary as to be a denial of Due Process. The fact that petitioner, by the same State, would first receive a life sentence for the murder and then death for the kidnapping of the same victim in the same transaction is so illogical and unfair as to be recognized by jurists, lawyers, and laymen

alike as a fundamental mistake and a dangerous and unconscionable precedent.

The unsworn, hearsay facts, as presented by the County Attorney of Tulsa County to the Trial Court at the presentence hearing for the kidnapping, present a heinous murder (R. 11-12). But, does the dastardliness of the act deprive a defendant of the right to Due Process? Does the popular feeling that because a dastardly act has been committed, a defendant "must" die, justify a life be given for a life regardless of how it is done?

Unthinking people have always cried out for revenge even if it was obtained at the sacrifice of much of mankind's preciously gained humanity, fairness and justice. Those rights which we have won at great sacrifice must be protected and safeguarded, regardless of the crime of the defendant or his guilt or innocence. To do otherwise, and thereby lose sight of fundamentals, is to remove much of what has been achieved toward civilization, humaneness, and justice.

It is not enough that, in the name of justice, we excuse our conduct in sentencing a man by saying in effect he showed no mercy to his victim. Presiding Justice Brett, writing the majority opinion for the Criminal Court of Appeals states (R. 50):

> "We are concerned, herein, only with matters of law. Mercy, which this defendant did not extend to his victim, is within the power of the Pardon and Parole Board and the Governor. Art. 6, Sec. 10, Okla. Const."

Petitioner asks only for Due Process. As judges and lawyers we either mean to courageously adhere to those concepts we are sworn to uphold, or we should abandon our high position as the defenders of right, liberty and justice.

There can be no consolation in logic or reason for our courts to try to justify a sentence and overlook the basic facts behind the obtaining of a death sentence where Due Process has been denied the defendant. The meaning of justice and Due Process cannot be a purely individual concept.

Petitioner's contention is not a thesis against capital punishment. It is our firm contention that, if it could conceivably be said that the Trial Court in Muskogee County in sentencing the petitioner to life for murder made a mistake in judgment, then for the prosecutor of the State to seize upon the State's failure to get a death sentence for murder and try the petitioner again, to do all within its power to obtain a death sentence for a lesser act of the same criminal transaction, and as a result petitioner is made to give up his life to the State, then petitioner has certainly been denied the fundamental fairness which forms the basis of Due Process of Law. By "mistake," we do not mean legal error. We mean "mistake" from the standpoint that other state prosecutors and judges may differ in their opinion about what punishment the petitioner should have received in the first instance, and they try to cause petitioner to "run the gantlet" again. *Green* v. *U.S.*, 355 U.S. ——, 2 L.ed. 199, 206. If petitioner must be twice subject to the possibility of forfeiting his life, twice run the gantlet for the death of one victim, then Due Process of Law is violated. As this Court has in effect said in the cases cited above, prosecutors (and we presume, judges) cannot obtain repeated prosecutions and sentences to wear out the accused and increase, as in the present case, the "odds" of the State in eventually obtaining the death penalty. It must be considered in this case, that petitioner was *also convicted* in Tulsa County for armed robbery (a capital offense) and *sentenced to 50 years imprisonment as a part of these same prosecutions* (R. 27).

(1) Due Process Has Been Denied in That Petitioner Has Been Subjected to Double Jeopardy and Double Punishment.

Whether there has been, in any state court case, a placing of the defendant in double jeopardy or subjecting him to double punishment, is generally based on various exacting technical tests applied by the various state courts. In the course of our research on this question we find no entirely adequate test to be used to determine whether double jeopardy exists in state cases. It is clear, however, that regardless of the technical tests, the spirit of the double jeopardy (which includes double punishment) provision comes within the Fourteenth Amendment, certainly insofar as it affects fundamental fairness in a case. In fact, a criminal proceeding may not technically be double jeopardy, and still, under the facts, be a violation of Due Process. One of the basic cases decided by this Court on the points just mentioned is *Ex parte Lange*, 85 U.S. 163, 168, 170-171, 173, 178; 21 L.ed. 872, 876-879, wherein this Court in its opinion by Mr. Justice Miller states:

> "If there is anything settled in the jurisprudence of England and America, it is that *no man can be twice lawfully punished for the same offense.* And though there have been nice questions in the application of this rule to cases in which the act charged was such as to come within the definition of more than one statutory offense, or to bring the party within the jurisdiction of more than one court, there has never been any doubt of its entire and complete protection of the party when a second punishment is proposed in the same court, on the same facts, for the same statutory offense. • • •
>
> "If in civil cases (says Drake, J., in State v. Cooper, 1 Green (N.J.) 375), the law abhors a multiplicity of suits, it is yet more watchful in criminal cases that

the Crown shall not oppress the subject, or the government the citizen, by *unreasonable* prosecutions.

"These salutary principles of the common law have, to some extent, been embodied in the Constitutions of the several states and of the United States. * * *.

"In the case of Cooper v. State, in the supreme court of New Jersey (1 Green N.J. 361), the prisoner had been indicted, tried, and convicted for arson. While still in custody under this proceeding he was arraigned on an indictment for the murder of two persons who were in the house when it was burned. To this he pleaded the former conviction at bar, and the supreme court held it a good plea. It is to be observed that the punishment for arson could not technically extend either to life or limb; but the supreme court founded its argument on the provision of the Constitution of New Jersey, which embodies the precise language of the Federal Constitution. After referring to the common law maxim the court says: 'The Constitution of New Jersey declares this important principle in this form: "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." Our courts of justice would have recognized and acted upon it as one of the most valuable principles of the common law without any constitutional provision. But the framers of our Constitution have thought it worthy of especial notice. And all who are conversant with courts of justice must be satisfied that this great principle forms one of the strong bulwarks of liberty.'

" * * * We shall see ample reason for holding that the principle intended to be asserted by the constitutional provision *must be applied to all cases where a second punishment is attempted to be inflicted for the same offense by a judicial sentence.*

"For of what avail is the constitutional protection against more than one trial if there can be any number of sentences pronounced on the same verdict? Why is it that, having once been tried and found guilty, he can never be tried again for that offense? Manifestly it is not the danger of jeopardy of being a second time found guilty. It is the *punishment* that would legally follow the second conviction which is the real danger guarded against by the Constitution. But if, after judgment has been rendered on the conviction, and the sentence of that judgment executed on the criminal, he can again be sentenced on that conviction to another and different punishment, or to endure the same punishment a second time, is the constitutional restriction of any value? Is not its intent and its spirit in such a case as much violated as if a new trial had been had and, on a second conviction, a second punishment inflicted?

"The argument seems to us irresistible, and we do not doubt that the Constitution was designed as much to prevent the criminal from being twice punished for the same offense as from being twice tried for it. * * *

"There is no more sacred duty of a court than, in a case properly before it, to maintain unimpaired those securities for the personal rights of the individual which have received for ages the sanction of the jurist and the statesman; and in such cases *no narrow or illiberal construction* should be given to the *words of the fundamental law* in which they are embodied."

In the case of *In re Nielson*, 131 U.S. 176, 33 L.ed. 118, the defendant had two indictments filed against him, one charging unlawful cohabitation between certain dates and the other charging adultery on the day following the conclusion

date charged in the cohabitation. Defendant was sentenced on the first indictment and pled former conviction to the adultery indictment. This Court, in an opinion by Mr. Justice Bradley, said and held:

"* * * The case was the same as if the first indictment had in terms laid the unlawful cohabitation for the whole period preceding the finding of the indictment. The conviction on that indictment was in law a conviction of a crime which was continuous, extending over the whole period, including the time when the adultery was alleged to have been committed. The petitioner's sentence, and the punishment he underwent, on the first indictment, was for that *entire, continuous* crime. It included the adultery charged. To convict and punish him for that also was a *second* conviction and punishment for the *same offense.* Whether an acquittal would have had the same effect to bar the second indictment is a different question, on which we express no opinion. We are satisfied that a *conviction* was a good *bar,* and that the court was wrong in overruling it. We think so because the material part of the adultery charged was comprised within the unlawful cohabitation of which the petitioner was already convicted and for which he had suffered punishment.

"* * * But be that as it may, it seems to us very clear that where, as in this case, a person has been tried and *convicted* for a crime which has various incidents included in it, he cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offense.

"* * * But where a conviction for a less crime cannot be had under an indictment for a greater which includes it, there it is plain that while an acquittal would not or might not be a bar, a *conviction of the greater crime*

would involve the lesser also, and would be a *bar;* and then the proposition first above quoted from the opinion in More v. Commonwealth would apply. Thus, in the case of State v. Cooper, 13 N.J. Law, 361, where the defendant was first indicted and convicted of arson, and was afterwards indicted for the murder of a man burnt and killed in the fire produced by the arson, the Supreme Court of New Jersey held that the conviction of the arson was a bar to the indictment for murder, which was the result of the arson. So, in State v. Nutt, 28 Vt. 598, where a person was convicted of being a common seller of liquor, it was held that he could not afterwards be prosecuted for a single act of selling within the same period. * * * 'It must, in a certain sense, be considered as a *merger of all the distinct acts* of sale up to the filing of the complaint, and the respondent can be punished but for one offense.' "

The Supreme Court of Kansas in a well reasoned opinion by Justice Valentine in *State* v. *Colgate* (1884), 31 Kan. 511, 3 P. 346, 348-352, had these facts, defendant had been acquitted of setting fire to a building and that acquittal was held to be a good defense to subsequent prosecution for setting fire to books of account. The Court states:

"* * * And, upon general principles, a single offense cannot be split into separate parts, and the supposed offender be prosecuted for each of such separate parts, although each part might of itself constitute a *separate* offense. If the offender be prosecuted for one part, that ends the prosecution for that offense: provided such part, of itself, constitutes an offense for which a conviction could be had. And, generally, we would think that the commission of a single wrongful act can furnish the subject-matter or the foundation of only one criminal prosecution. * * *

"In almost every public offense, if not in every one, several separate and distinct facts may enter in to constitute the offense. These facts may exist contemporaneously with the wrongful act or acts of the offender, or they may take place subsequently and often, in succession, as succeeding consequences of the wrongful act or acts. * * *

" * * * Of course, the prosecutor may associate the criminal act with all its consequences, and then *carve* therefrom the *highest crime* that can be carved from such act and its consequences, and then prosecute the wrong-doer for such crime. If he chooses, however, he may carve out a smaller degree of crime, and prosecute for that only. But he should be allowed to *carve but once.* * * * The offense of setting fire to and burning the books, as well as the offense of setting fire to and burning the mill, would have been included in the aggregated offense of setting fire to and burning the mill, with all its contents. But we do not think that the prosecutor should be allowed to multiply prosecutions indefinitely, by dividing up the consequences of a single wrongful act, and founding a separate prosecution upon each of such consequences."

In the present case the question of double jeopardy and double punishment resolves itself into two aspects: (a) the conviction for the murder, in the course of the kidnapping, is a complete bar to a subsequent prosecution for kidnapping and, (b) to the extent that the death penalty for the kidnapping is based upon the fact that the kidnapping ended in the murder, for which petitioner had already been sentenced, then the death penalty is double punishment for the murder.

(a) It is presumed that in *Cooper* v. *State* (New Jersey), cited in the cases above, if the State had convicted for the

murder and then sought to convict for the arson that the same reasoning would prevail and the prosecution for arson would be barred. In other words, it would make no difference in reason and logic whether the crime was murder as the result and in the course of an arson, or an arson in the course of which a murder resulted. Conviction on one of the two crimes would be a bar to prosecution for the other. So, we contend it also follows from the rationale of the cases cited above, that after petitioner was convicted of murder occurring in the course of the kidnapping of the victim, he could not later be prosecuted for kidnapping in the course of which murder was committed on the same victim. The motive and intent in both crimes presumably was the same, namely to escape capture, and certainly the victim was the same. Further, in many cases of murder there are involved also the completed elements of kidnapping as well as perhaps other crimes. Multiple prosecution for each would result in the prosecutors, relying on the resources of the State, being able to eventually obtain their personally desired sentence for a defendant, all in violation of Due Process. In the present case, the kidnapping is such an integral part of the murder prosecution that any punishment for murder necessarily punishes for the kidnapping and does not leave the State free to again put petitioner in jeopardy or punish him for the kidnapping. Let the prosecutor *carve out the highest crime* that can be obtained from a criminal sequence, but he should be allowed to *carve but once.*

(b) It is a double punishment to petitioner, for the trial court in the kidnapping prosecution, to actually in fact inflict punishment again for the murder since petitioner had previously been sentenced for the murder. The Prosecuting Attorney of Tulsa County made certain that the murder was presented in his unsworn hearsay statement in the presentence hearing on the kidnapping (R. 11-12):

"* * * Williams forced Cook to drive to a point approximately 3 miles east and 4 miles north of Taft, in Muskogee County, to the end of a dead-end road, where Williams walked Cook out into the weeds where, according to Williams' own statement, Cook kept begging not to be tied up for that he, Cook, would have to stay there all night—no one would find him. Cook, according to Williams' statement had his hands up in front of his face and Williams shot Cook from the right side of the head, behind the ear. According to the autopsy report, the gunshot wound in the head produced death practically instantaneously and—

"Mr. Woodson: I would like again to interpose an objection here, that the defendant has pleaded guilty to two charges, one the armed robbery and one the kidnapping. The statements being made by the County Attorney relate to another charge, that has been passed upon in another jurisdiction.

"The Court: Well, I will consider it as the statement of the County Attorney of course and as a continuing thing in the matter, which I think is proper to advise the Court of all the facts surrounding the two crimes. Of course, as far as the highjacking case is concerned, it might not at all be competent, but from the kidnapping standpoint, it is, of course, a continuous thing, as long as he had the victim in his charge and under his control, I think all the facts pertinent to the incident are competent to the Court and the Court should know, so I will overrule your objection.

"Mr. Woodson: Exception.

"Mr. Edmondson: —and in the opinion of the pathologist who performed the autopsy, the gun was fired from very close range, certainly less than six inches and according to the angle of fire, and the angle of the bullet into the head, the opinion of the pathologist was

that the shot was fired from the rear of the deceased and to the right of the deceased."

In arriving at the extent of punishment to be inflicted for the kidnapping, the trial court had in mind primarily the *murder* when he sentenced petitioner to death for the *kidnapping* because the trial court in his comments in pronouncement of sentence upon the petitioner stated (R. 29):

> "The Court: The Court has been very deliberate in the matter of this case, has given it hours of consideration, and investigation; investigation of your record, investigation of the facts which have been alleged (fol. 62), which have been stated, and which you admit were part of this crime which you have committed in Tulsa County, which resulted in the murder of the victim, Reverend Cook, to which you have pled guilty and been sentenced in Muskogee County, and which the Court takes into consideration, that murder as being a part and parcel of the crime which is here, as a continuous thing. It is the Court's opinion, that there has never been in the history of Tulsa County, a more *brutal, vicious crime* committed, this crime to which you have pled guilty here. The fact that you have pled guilty to the crime of murder in Muskogee County and received a life sentence there, is *not* a particularly or material consequence in the matter of the Court passing sentence in this case."

From this statement of the Trial Court it is apparent that the murder was the motivating factor behind the death penalty for the kidnapping. The kidnapping in Tulsa County was not what the Trial Court had in mind when he stated that, "there never has been in the history of Tulsa County, a more brutal, vicious crime committed, this crime to which you have pled guilty here." The murder, and only

the murder, moved the Court to the fundamental injustice of repunishing petitioner for that crime, and more *severely* than he had already been punished for it before, when the crime actually charged in Tulsa County was kidnapping. The Information charging the kidnapping to which petitioner pled guilty, does not show the use of firearms, threats, violence or harm (R. 3-4). The so-called facts of the kidnapping do not indicate the kidnapping was in itself heinous or brutal crime.

The Presiding Justice of Criminal Court of Appeals of Oklahoma in his opinion with regard to the murder states (R. 47):

> "The reason for killing the victim is obvious. It is to destroy the means of the kidnapper's positive identification. Hence, it was reasonable for the trial judge in measuring the defendant's intent at the time of the kidnapping in the case at bar, to consider that the defendant, Williams, not only intended to deprive Tommy Cooke of his liberty and property, but to take his life as the means of destroying the defendant's identification. Moreover, it was for the trial court to consider that thereafter it was the defendant's intent to steal Cooke's automobile as a means of avoiding apprehension for the violations he had already committed, and also to use it as an instrument of escape for those crimes he intended to commit in his one man crime wave. Yet, it is urged there is nothing particularly vicious in the single act of kidnapping.
>
> "We might agree that contention possesses merit when the kidnapping is viewed as an isolated crime. But, the courts are not required to insulate themselves to facts clearly manifesting intent, and the ultimate consequences of criminal acts. Neither cold law, righteous justice, nor plain logic requires such an approach to

> the problem of imposing punishment in any case. To the contrary, justice requires a consideration of all the factors leading up to, at the time of the commission of the act, and even acts occurring subsequent thereto, in determining intent in many cases. When so measured, the instant act of kidnapping presents a most heinous picture. Tommy Cooke was marked for death immediately upon Williams's asserting dominion over him. The defendant's dastardly intent was confirmed when he lost little time in compelling his victim to drive to an isolated, dead-end road where, in a cold and calculating manner, he immediately executed him. These are all matters within the trial court's discretion and consideration in determining the penalty to be imposed."

With all due respect, it is apparent that even the Criminal Court of Appeals in analyzing the trial court's death sentence, was again repunishing petitioner for the murder. There was much emphasis placed by the writer of that opinion on the consideration of the intent of petitioner. Both the trial court and the appellate court have assumed that the intent of petitioner was to kill the victim from the very beginning of the kidnapping and thus create a kidnapping with intent to murder. And, this in turn is to make the kidnapping more dastardly. However, this is a wholly unwarranted presumption of intent to help the courts justify the death penalty. Nothing in the record is pointed to by the trial court or the appellate court upon which such intent can be based; to the contrary, petitioner, according to the County Attorney's hearsay statement, started to tie up the victim (R. 11-12). However, even assuming that petitioner had intended to kill the victim from the beginning of the kidnapping, the intent to murder would "merge into the completed crime" of murder, *Prince* v. *United*

States, 352 U.S. 322, 328, 1 L.ed. 2d 370, 374. Regardless of the basis of rationalization, it is obvious that petitioner has been twice punished for the murder occurring in Muskogee County in violation of Due Process of Law. All of the comments appearing of record and in the opinions of the trial and appellate courts indicate that there occurred only one continuous criminal transaction, so closely related in all respects, that one crime cannot be considered or punished without punishing for the other, especially where petitioner was convicted and sentenced for the murder first.

It is apparent from the quotations above cited from the record, that the State of Oklahoma was in this case in fact *determined* that through the use of repeated prosecutions petitioner would eventually suffer the death penalty. In *Ciucci* v. *Illinois*, 356 U.S. ——, 2 L.ed. 2d 983, this Court, upon a different fact situation, had the same question before it. In view of the different fact situation, we cite that case in support of our contention. Both the majority and minority in the *Ciucci* case sustain our position in this case. The *Ciucci* case involved three separate prosecutions by the State for the murder of four victims killed on one single occasion by the defendant. Counsel for defendant had included in their brief to this Court clippings from the newspapers which contained statements by the prosecution that the sentences (20 years and 45 years) in the first two murder cases were unsatisfactory, and that the prosecution was *determined* to prosecute Ciucci until the death penalty was obtained. This Court did not consider the newspaper articles since they were not included in the record and were not considered by the State courts. However, two of the Justices who concurred in the majority opinion indicated that if the defendant had been able to establish the prosecution's determined purpose as alleged, they might have held that fundamental unfairness did exist. Also, in *Ciucci* v.

Illinois there were *separate victims* of each murder and each crime prosecuted was of *equal magnitude*. In the present case there was the *same victim* in each prosecution, and kidnapping, as a separate crime, is a crime of a *lesser magnitude* than murder. (These same distinctions as well as others existed in *Hoag* v. *New Jersey*, *supra*.) These are vital distinctions, and except for these distinctions, the present case fits squarely within that portion of the *Ciucci* case which denounces repeated prosecutions by the State to achieve the death penalty. In the present case we do not have to rely on newspaper clippings to establish the *determined* purpose of the State of Oklahoma to prosecute the petitioner until the death penalty was obtained. The purpose of the kidnapping prosecution in Tulsa County was to make *certain* that petitioner receive the death penalty for murder, and this is obvious from a reading of the County Attorney's statement in the record (R. 10-18) and as quoted above and examining in turn how the trial and appellate courts were misled into committing an injustice as above quoted. The present case is consistent with the majority opinion and also clearly in line with the dissenting opinion in the *Ciucci* case which states:

> "This case presents an instance of the prosecution being allowed to harass the accused with repeated trials and convictions on the same evidence, until it achieves its desired result of a capital verdict."

The kidnapping prosecution in Tulsa County was a successful attempt on the part of the State to make sure that petitioner received the death penalty for the murder in Muskogee County. The use of the facts of the murder as a basis for augmenting the fair and just punishment for the kidnapping is a further attempt through multiple prosecutions for the same offense to achieve a desired sentence by the State, all of which is in violation of Due Process of Law.

(2) Due Process Has Been Denied in That the Doctrine of Res Judicata Precludes a Second Punishment Being Inflicted Upon Petitioner for the Murder.

The doctrine of *res judicata* would prevent the trial court, in fixing the penalty for the kidnapping, from again considering and punishing petitioner for the previous murder for which petitioner had been sentenced and which was a part of the same continuing criminal transaction. This Court in *Sealfon* v. *United States*, 332 U.S. 575, 578; 92 L.ed. 180, 184 held:

> "• • • But res judicata may be a defense in a second prosecution. That doctrine applies to criminal as well as civil proceedings (United States v. Oppenheimer, 242 U.S. 85, 61 L.ed. 161, 164, 37 S.Ct. 68, 3 ALR 516; United States v. De Angelo (CCA 3d NJ), 138 F.2d 466, 468; annotation in 147 ALR 991; see Frank v. Mangum, 237 U.S. 309, 334, 59 L.ed. 969, 983, 35 S.Ct. 582) and operates to conclude those matters in issue which the verdict determined though the offenses be different. See United States v. Adams, 281 U.S. 202, 205, 74 L.ed. 807, 808, 50 S.Ct. 269."

In the above case it was necessary to determine what issues the verdict of the jury determined. In the present case, there can be no question that the plea of guilty to the murder in Muskogee County and the judgment and sentence entered therein, concludes the murder and all of its circumstances and prohibited the trial court in Tulsa County from again considering and punishing for the murder for the purpose of sentencing the petitioner in the kidnapping case. In fact, since the trial court in Muskogee County considered the kidnapping in his sentence for the murder, the doctrine of *res judicata* should prevent the issue and facts of the kidnapping from being prosecuted again. Certainly,

under this doctrine, the trial court for the purpose of determining the sentence for kidnapping cannot reconsider and punish petitioner again for the murder.

(3) Due Process Has Been Denied to Petitioner in That the Trial Court Considered Improper Statements in Aggravation of the Kidnapping.

With reference to 22 O.S. 1951, secs. 973-975, set forth in full under "Statutes" above, it is petitioner's contention that sec. 973 leaves a "discretion" with the trial court *to hear* the circumstances of the case when either counsel "suggests," or the trial court "may in its discretion" *not hear* any circumstances of the crime at all. But, *if* the court exercises its discretion to hear circumstances in aggravation or mitigation, then definitely, under sec. 974, the court *must* hear the testimony of witnesses examined in open court and upon notice to the adverse party. Furthermore, our legislature removes any doubt about the evidence to be heard, by adding sec. 975, which clearly provides that nothing "verbal or written, can be *offered* to or *received* by the court * * * in aggravation or mitigation of the punishment, except as provided in the last two sections." In other words, where punishment is left to the trial court, it has discretion to hear or not hear further circumstances, but if it elects to hear, it must hear "witnesses." That is to say, hear evidence under oath, subject to cross examination, and under the rules of evidence.

While the Criminal Court of Appeals of Oklahoma has never directly passed on the meaning of the sections in question, the language used by that Court in previous cases is enlightening and should be considered. In the case of *In re Watkins*, 21 Okla. Cr. 95, 205 P. 191, the Court held:

> "The procedure followed by the trial judge in hearing testimony of witnesses as to the enormity of the crime

before assessing the death penalty was proper and to be commended. Section 5954 Revised Laws 1910." (now section 973)

Again in *Nowlin* v. *State*, 128 P. 2d 1023, the Court held:

"Evidence was submitted at the hearing upon the motion touching this issue. This was proper under the Statutes above quoted."

Again in *Emmons* v. *State*, 291 P. 2d 838, 842, the Court held:

"The proof of prior conviction was by Court records and officials. This procedure has been many times approved and is not dependent upon whether the accused at the trial testified or did not testify."

In the present case, the Criminal Court of Appeals states (321 P. 2d 993-994; R. 43-44):

"• • • But, two things are clear under the provisions of sec. 973. First, pursuing this method of procedure is a matter of the trial court's sound discretion. Second, its use is *further* contingent upon the request of either the state or the defendant. • • •

"It is contended that under the provisions of sec. 975 it is the mandatory duty of the court to hear witnesses. But, in construing secs. 974 and 975 in light of the provisions of sec. 973, we are of the opinion that both the provisions of sec. 974 and sec. 975 are contingent upon the request for evidence under the provisions of sec. 973, or it is within the trial court's discretion to pursue some other reasonable method. When the parties fail to make a request for the privilege thereof, the same is waived and some other method of supplying the court with the necessary information for the

pronouncement of judgment and sentence may be substituted instead."

Thus the highest court of Oklahoma construes the section 973 to mean that the trial court has, first, the discretion to hear circumstances and, second, that if it should desire to hear circumstances, then the trial court has the further discretion to use either the method set forth in the statutory sections or some "other reasonable method." We respectfully submit that such a misconstruction of the sections is a refutation of the clear words of the statute and intent of the legislature. These statutes had their origin in our State from the Compiled Laws of Dakota 1887. Our State had the advantage of compiling laws based upon the best laws of other states which preceded us into the Union, and our legislature clearly meant these sections to be a safeguard to protect a defendant from abuses by the State in sentencing. It goes without saying, these sections also protect the State in the same manner. The construction placed upon these sections by the Oklahoma Criminal Court of Appeals would leave them with no force and effect and permit the trial judge to hear whatever information he pleased even though request had been made to invoke the Statutes.

We recognize that this Court generally considers itself bound by the construction of state statutes by the highest court of a state. However, under the doctrine announced in *Yick Wo* v. *Hopkins*, 118 U.S. 356; 30 L.ed. 220 (and many cases since), the highest court of the state may bind this Court in construction of the state statutes, yet if the state's construction, administration or application of its statute is wholly unreasonable or fundamentally unfair it may violate the Due Process Clause under the Fourteenth Amendment, as in the present case.

Further, the Oklahoma Criminal Court of Appeals said that the parties failed to make request under sec. 973 for the privilege of invoking the statutory procedure (321 P. 2d 994; R. 44), and that defendant did not attempt to invoke the provisions nor did defendant request the taking of evidence in mitigation, and at no time intended to invoke said provisions. Section 973 states "upon suggestion of either party," then the court may hear or not hear circumstances at his discretion. It is not incumbent upon the defendant to invoke the provisions of the statute, the State can do so, as here the County Attorney states to the trial court that it should be, "advised of the facts in this case" and "we have typed up a brief statement of facts concerning both of these crimes," etc. (R. 10). Such language by the County Attorney would certainly amount to a "suggestion" or "request" that he has circumstances in aggravation that he wants to introduce. Therefore, in the present case, the State invoked the statutes and if the trial court wanted to hear circumstances in aggravation or mitigation, he was bound to do so by hearing sworn witnesses in open court.

The statement of the County Attorney of Tulsa County to the trial court in the presentence hearing on the kidnapping plea is hearsay in its entirety (R. 10-18). Many times during the course of this statement the County Attorney mentions that "by his own admission" or "according to Williams' own statement" such and such took place or was said. If such confession or admission by petitioner exists why were not the documents or witnesses presented to the trial court? The trial judge in Muskogee County in discussing the sentence for the murder mentions that a motion to suppress evidence was held in his court (R. 23) and that there were some two confessions, one the trial judge never saw, it was destroyed, and the other was, according to testimony, obtained after petitioner was beaten (R. 24). Certainly, if a confession or confessions existed

the County Attorney of Tulsa County owed the duty to the State, the trial court, and the petitioner to produce his documents or witnesses. The County Attorney does not say how or where he got his "statement of fact." If it was gained through personal conversation with petitioner, we are not aware of it, and certainly such a fact should have been mentioned in the prepared "statement" by the office of the County Attorney. It may have been prepared by a clerk or investigator of his office who was not an officer of the court. The County Attorney never stated the source of his alleged facts, or that he had verified or vouched for the facts and not only was the long statement hearsay, but it was liberally loaded with highly inflammable and prejudicial language. This entire procedure was in flagrant violation of the careful, humane method prescribed by our legislature and violated the concept of fundamental fairness that must be present in all stages of all judicial proceedings (especially criminal capital cases) to comply with the Fourteenth Amendment Due Process.

Counsel for petitioner in the trial court, Mr. Fred Woodson, objected three separate times (R. 11, 12, 13) to the hearsay statement in question. On the occasion of the last objection, the trial court allowed a continuing "objection to the entire statement being made" (R. 13). All objections made by Mr. Woodson were properly preserved. Much of the special concurring opinion written by Justice Powell of the Oklahoma Criminal Court of Appeals (321 P. 2d 1002-1008; R. 68-77) is based upon the fact that the trial court asked the petitioner certain questions concerning corrections and the accuracy of the long and inflammatory hearsay statement of the County Attorney. The petitioner answered these questions only briefly, not fully, trying to correct the impression left by the long statement of the County Attorney. The concurring opinion emphasizes a "waiver" and that the conduct of petitioner "was

equivalent to a stipulation" (321 P. 2d 1008; R. 78). However, any answer made by petitioner was with the realization that objections had been previously preserved, that the procedure used was not just, and with the understanding that errors in the trial court could be remedied on appeal. At no time did counsel or petitioner desire to waive or stipulate away either the *objections* entered or petitioner's *life*. The law on this question is as stated in 89 C.J.S. pp. 504 and 505:

> "Error in the admission of evidence is not waived by conduct not amounting to an express or implied assent to the reception of the evidence. • • • The erroneous admission of evidence is waived by a subsequent withdrawal of objections thereto; but the waiver must be so specific as to leave no doubt on the subject. • • •"

In *Palmer* v. *City of Long Beach*, 33 Cal. 2d 134, 199 P. 2d 952, 958, the Court states:

> "In view of an attorney's duty to his client, it should not lightly be assumed that he stipulated away his case. • • • Stipulations must be given a reasonable construction with a view to giving effect to the intent of the parties and the language used will not be so construed as to give it the effect of the admission of a fact obviously intended to be controverted or the waiver of a right not plainly intended to be relinquished. • • •'". (Citing many authorities.)

And the Court further states, quoting from another California opinion:

> "'• • • but there should be no sacrifice of substantial rights merely to subserve the constant importuning to speed up trials. The purpose of every trial is to examine into disputed facts. • • • Stipulations are ordi-

narily entered into for the purpose of avoiding delay, trouble, or expense. * * *'"

This case was a civil suit and the language is strong and clear. How much more important, then, is it in a criminal case, with a defendant's life in the balance, to protect his every right and to assume no fact or waive any right that prejudices him. In *Green* v. *United States*, 355 U.S. ——, 2 L.ed. 2d 199, 206-207, this Court states:

"'Waiver' is a vague term used for a great variety of purposes, good and bad, in the law. In any normal sense, however, it connotes some kind of voluntary knowing relinquishment of a right. Cf. Johnson v. Zerbst, 304 U.S. 458, 82 L.ed. 1461, 58 S.Ct. 1019, 146 ALR 357. * * * And as Mr. Justice Holmes observed, with regard to this same matter in Kepner v. United States, 195 U.S. 100, at 135, 49 L.ed. 114, 127, 24 S.Ct. 797, 1 Ann. Cas. 655: 'Usually no such waiver is expressed or thought of. Moreover, it cannot be imagined that the law would deny to a prisoner the correction of a fatal error, unless he should waive other rights so important as to be saved by an express clause in the Constitution of the United States.'"

Finally, even if we consider that the procedure used, by the County Attorney and the trial court in presenting presentencing information by an unsworn statement over objection of petitioner, is correct under Oklahoma procedure, is it not a procedure subject to fundamental unfairness? In other words, assuming the Oklahoma Criminal Court of Appeals is correct in its interpretation of the statutory provisions in question here, and the trial court has discretion in all events as to its sources of information, does this mean that the trial court can permit unjust practices and unfair abuses in our humane administration of the law

to determine the sentence to be assessed? In *Williams* v. *New York*, 337 U.S. 241, 93 L.ed. 1337, this Court had a case before it in which New York procedural policy encourages the trial court to consider information about the defendant. This Court states (337 U.S. 251, 93 L.ed. 1344):

> " • • • Leaving a sentencing judge free to avail himself of out-of-court information in making such a fateful choice of sentence does secure to him a broad discretionary power, one susceptible of abuse. • • • We cannot say that the due-process clause renders a sentence void *merely* because a judge gets additional out-of-court information to assist him in the exercise of this awesome power of imposing the death sentence."

Mr. Justice Rutledge dissenting states (337 U.S. 253 or 93 L.ed. 1345):

> " • • • The record before us indicates that the judge exercised his discretion to deprive a man of his life, in reliance on material made available to him in a probation report, consisting almost entirely of evidence that would have been inadmissible at the trial. Some, such as allegations of prior crimes, was irrelevant. Much was incompetent as hearsay. All was damaging, and none was subject to scrutiny by the defendant.
>
> "Due process of law includes at least the idea that a person accused of crime shall be accorded a fair hearing through all the stages of the proceedings against him."

It must be considered in the case above, that the trial court in New York was relying on New York Statutes, and upon a probation report. As this Court states, "probation workers making reports of their investigation have not been trained

to prosecute but to aid offenders." This is entirely different from the prejudicial, unnamed source, unverified and unvouched for report of the present case presented by the Tulsa County Attorney who is trained to prosecute, and particularly, as here, where he is overzealous and too sensitive to public clamor.

In the case of *Townsend* v. *Burke*, 334 U.S. 736; 92 L.ed. 1690, this Court reviewed the record as to the sentencing of that defendant upon a plea of guilty and held that the absence of defense counsel placed the defendant at a disadvantage and that the trial court either designedly or carelessly was misinformed or misread the record in the sentencing; that the result reached, "whether caused by carelessness or design, is inconsistent with due process of law, and such a conviction cannot stand." Error on the part of the trial court in considering, and being influenced by, inflammatory, prejudicial information, or misinformation, or misinterpretation of information, as we have in the present case, is subject to the test of Due Process. The foregoing statement should also be applicable upon the record of any given case where such fundamental unfairness exists even though the defendant was represented by counsel. Representation by counsel, no matter how capable, cannot be the entire answer to so fundamental a problem, for such errors may well occur with counsel present, as in the present case.

(4) Due Process Has Been Denied in That the Punishment Assessed Against Petitioner Is Wholly Unreasonable and Disproportionate to the Kidnapping in This Case.

There are four crimes punishable under the Statutes of Oklahoma by death, they are: murder, robbery with a dangerous weapon, rape in the first degree, and kidnapping. We recognize that the death penalty has been assessed in this State in a few cases for murder upon a plea of guilty, and that such penalty was sustained by the Criminal Court

of Appeals. Even the most seasoned and experienced defense counsel, in considering such cases in the present case, would naturally reason that those cases were not precedents in this kidnapping case since petitioner had already been previously sentenced for the murder. Thus in trying to advise petitioner as to the punishment he might receive upon a plea of guilty to the kidnapping petitioner's counsel did not feel the death penalty could be founded upon those Oklahoma murder cases since kidnapping, as such, is a crime of lesser magnitude than murder and petitioner had been previously sentenced for the murder. Petitioner's counsel found that the death penalty had been assessed, and sustained by the Oklahoma Criminal Court of Appeals, in some few cases of rape in the first degree, and robbery with firearms. But, in none of those cases did we find that these were split or *second* prosecutions by the State of Oklahoma even though most of the cases involved the elements of other completed crimes.

There are six kidnapping cases reported in Oklahoma other than this present case. In each of these cases the purpose was—rape, robbery, or to escape incarceration. In all six cases the kidnapping was potentially dangerous to the victim; most of them recite facts showing threats and use of firearms and many cases involved hardened criminals with prior criminal records. Further, in five of these cases, the punishment was assessed by Oklahoma juries and should be indicative of the feeling of the people. Yet the maximum punishment assessed in these six kidnapping cases in Oklahoma was *50 years* in the State penitentiary. The overall punishment, for that crime in Oklahoma, average was *16.3 years* (exclusive of the present case which is the *first death penalty* case for kidnapping in Oklahoma). *Norris* v. *State*, 68 Okla. Cr. 172, 96 P. 2d 540; *Shimley et al.* v. *State*, 87 Okla. Cr. 179, 196 P. 2d 526; *Flowers* v. *State*, 95 Okla. Cr. 27, 238 P. 2d 841; *(Nathaniel) Williams* v. *State*, 96 Okla. Cr.

362, 255 P. 2d 532; *Phillips* v. *State*, Okla. Cr., 267 P. 2d 167; *Ratcliff* v. *State*, Okla. Cr., 289 P. 2d 152.

The *Norris* case cited above involves a defendant charged with kidnapping, second and subsequent offense. Since the defendant was charged under the habitual offender act of Oklahoma (21 O.S. 1951, sec. 51), the maximum punishment for the kidnapping would have been life in the penitentiary. The information filed charged defendant with having been previously convicted and sentenced for: robbery with firearms, murder in the first degree, and another murder in the first degree occurring on the same date as the first murder. The portion of the testimony repeated in written opinion has language such as, " * * * Norris said, 'Shoot him in two, if you have not guts enough to shoot him, give me that gun, I have.'" The victim was finally able, by force, to get away from defendant and his accomplice. The defendant Norris was sentenced in accordance with the verdict of the jury to imprisonment for a term of 30 years.

In reviewing the six Oklahoma kidnapping cases there was nothing that would indicate that petitioner would on a plea of guilty to the kidnapping receive the death penalty especially since he had previously been sentenced for murder. Jurists, lawyers, and defendants have the duty to resort to prior cases of the highest courts of our states, and they naturally rely and have the right to rely on those cases, where applicable, as precedents. We should be able to respect those cases and rely upon the sentences approved therein as being a guide in similar cases under the doctrine of *stare decisis*. We submit that lawyers, regardless of how experienced, would have reviewed the Oklahoma kidnapping cases without suspecting that a plea of guilty in the present case would bring a sentence of death in the electric chair. Nothing about these prior cases gives notice to that effect, and the present case amounts to a type of unlawful entrapment of the petitioner.

Furthermore, it must be considered that the trial judge in Muskogee County had previously sentenced the petitioner to life in the penitentiary for the murder. This fact cannot be lightly waved aside, or ignored. That judge states (R. 23), "I want to do the right thing. I may be *criticized* for what I'm about to do, * * *" Assuming that he made some mistake or mistakes in analysis of prior murder cases or in considering the "facts" as he knew them, the sentence he imposed was nonetheless a solemn conscientious judicial determination and, it was made without fear of possible popular criticism that would follow. He had heard testimony in a motion to suppress evidence and at least seen a confession whether valid or not, and considered the circumstances in aggravation and mitigation. His court and the judgments rendered therein are of an equal status with the trial court in Tulsa County in the present case. We carefully considered the record of the trial court in Muskogee County, and at the presentence hearing in Tulsa County that record was introduced into evidence (R. 21-25). It is submitted that the sentence for the murder should have been considered by the Tulsa trial court and given the weight and respect due any judicial determination.

The Oklahoma Legislature passed the present kidnapping statute (21 O.S. 1951, sec. 745) permitting the death penalty in 1935, sometime after the Lindbergh Act was passed by Congress. It is difficult to conceive that by the passage of the Oklahoma Statute the Legislature raised kidnapping, *per se*, to be a crime of same magnitude as murder. There is no more heinous crime than murder, and once the defendant has been sentenced for the murder, he would naturally consider that any sentence assessed for a crime of lesser magnitude would be less severe than that assessed in the murder where the lesser crime is a part of the same criminal transaction against the same victim. The Legislature certainly did not intend that the death penalty be inflicted

for the kidnapping where the defendant had already been sentenced for the ultimate crime committed against the victim. They intended that the death penalty be available where *only the one prosecution* is brought against a defendant for the kidnapping and where the facts of the kidnapping are highly aggravated and result in some other completed serious crime.

The punishment assessed in the present case is not excessive in the sense that it exceeds the punishment permitted by statute for the crime of kidnapping. However, the death penalty does exceed the *just* punishment for this present case. This Court has recognized that a state may deny Due Process by enacting statutes that prescribe a penalty, "so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable (citing other cases)." *St. Louis, Iron Mountain and Southern Ry. Co.* v. *Sicksey Williams,* 251 U.S. 63, 67; 64 L.ed. 139, 141. Applying the language of that case to the present case, we do not contend that the death penalty provision of the statute is disproportioned and unreasonable in a *proper* case, as we state above, but under the facts and circumstances of *this case* the punishment assessed to petitioner fits perfectly within the doctrine announced by that language. In other words, while the punishment provided in the statute, *per se* may not be excessive, yet the administration of the punishment may be so unjust, "oppressive," "unreasonable," and "disproportionate" to the crime actually committed, as appears in the present case, that the punishment is in violation of the Due Process Clause.

Conclusion

We respectfully submit that the entire criminal prosecution in Tulsa County for kidnapping was an obvious, unreasonable, fundamentally unfair attempt by the State of Oklahoma to insure that petitioner pay with his life for the murder in Muskogee County. The means and measures used to bring about the death penalty was through consecutive prosecutions and through proceedings which were, as we have pointed out above in this case, not in the spirit of fair dealing, nor in keeping with the fundamental fairness and justice required by Due Process. We therefore respectfully urge, that in view of the matters set forth in this brief, that this Court hold that petitioner has been denied Due Process of Law under the Fourteenth Amendment in this kidnapping case.

Respectfully submitted,

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In The
Supreme Court of the United States

No. 124

October Term, 1958

EDWARD LEON WILLIAMS,
Petitioner,

VERSUS

THE STATE OF OKLAHOMA,
Respondent.

On Writ of Certiorari to the Criminal Court of Appeals of the State of Oklahoma

BRIEF OF RESPONDENT

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JANUARY, 1959.

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AUTHORITY

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BRIEF OF RESPONDENT

The preparation of a brief in this case has not been easy. In the first place, the contentions of petitioner, while presented in such manner as to give them a semblance of plausibility, are so basically unsound and lacking in merit that decisions based upon the same or similar states of fact are not available. In the second place, the petition-

er's contentions, though presented under several subheads in the brief, are so interwoven that any attempt to separately consider them can only result in repetition.

Petitioner's principal claim is that of double jeopardy. On page 7 of the brief, counsel states:

> "Petitioner has been placed in double jeopardy for his life and subjected to double punishment for the same offense. Once petitioner has been convicted of murder, he cannot be prosecuted for the kidnapping of the same victim as a part of the same continuing criminal offense. The doctrine of double jeopardy prevents petitioner from being twice convicted for the same criminal offense."

On page 8 counsel states:

> "All of the facts, circumstances, and intents of the murder and kidnapping cases are so closely connected that they all merge into the ultimate completed crime, and the conviction and sentencing for the ultimate crime necessarily includes the lesser crime, in this case, of kidnapping."

Again, we know of no such decision. While counsel makes the broad statements above quoted he does not appear to rely upon the guaranties of the Fifth Amendment but rather to that kind of "double jeopardy" outlined in the language at the bottom of page 9 from the opinion of this Court in *Palko* v. *Connecticut*, 302 U. S. 319, 328, 82 L. Ed. 288, 293. But the Oklahoma Constitution contains the same prohibition against former jeopardy as that set forth in Amendment V to the United States Constitution. Section 21 of Article 2 of the Oklahoma Constitution provides in part:

"Nor shall any person be twice put in jeopardy of life or liberty for the same offense."

The statutes in turn provide a manner in which such defense of former jeopardy shall be interposed. Section 513 of Title 22, O. S. 1951, provides:

"There are three kinds of pleas to an indictment of information. A plea of:

"First, Guilty.

"Second, Not Guilty.

"Third, A former judgment of conviction or acquittal of the offense charged, which must be specially pleaded, either with or without the plea of not guilty."

Section 515 provides that the plea shall be entered in substantially the following form:

* * * * * * * * *

"3. If he plead a former conviction or acquittal:

"The defendant pleads that he has already been convicted (or acquitted, as the case may be), of the offense charged in this indictment or information, by the judgment of the court of * * * (naming it), rendered at * * * (naming the place), on the * * * the day of * * *."

This constitutional right to claim former jeopardy must be protected by plea, else it is waived and cannot subsequently be reclaimed.

White v. *State*, 23 Okl. Cr. 198, 214 P. 202;
Ex parte Wood, 21 Okl. Cr. 252, 206 P. 541;
Petitti v. *State*, 3 Okl. Cr. 587, 107 P. 954;
Ex parte Zeligson, 47 Okl. Cr. 45, 287 P. 731;
Mowels v. *State*, 52 Okl. Cr. 193, 11 P. 2d 205;

Fines v. *State*, 32 Okl. Cr. 304, 240 P. 1079;
Collins v. *State*, 70 Okl. Cr. 340, 106 P. 2d 273.

In this case none of the elements requisite for application of the rule relative to former jeopardy exist. The two crimes of kidnapping and murder were entirely distinct and separate crimes, though the murder followed the kidnapping. Counsel has recognized this fact by designating the murder as a "separate crime." The information charging the kidnapping made no reference whatever to the later murder. Instead, the information alleges the kidnapping to have been with the intent "to cause the said Tommy Robert Cooke to be secretly confined and imprisoned at a point in Tulsa County, State of Oklahoma, unknown to this affiant, and against the will of the said Tommy Robert Cooke, for the purpose of extorting a thing of value and an advantage from the said Tommy Robert Cooke." It appeared that the petitioner had robbed his victim of money and an automobile. A separate charge of robbery was filed and the defendant plead guilty and received a sentence of 50 years for such crime. It has not even been suggested that such punishment was a bar to or should act in mitigation of the punishment imposed for the crime of kidnapping. Equally unsound is the claim that the kidnapping "merged" in the crime of murder.

As already stated, we have found no decisions involving an identical state of facts. However, the decisions supporting our position in principle are so numerous that we hesitate to engage in any extensive review of them.

Section 192 of the U. S. Penal Code declares it to be a crime for any person to forcibly break into or attempt to break into any postoffice, with intent to commit in such postoffice any larceny or other depredation. Section 190 makes it a crime to steal, purloin or embezzle any mail bag or other property in use or belonging to the postoffice department, or to appropriate any such property to one's own use or for any other purpose than its proper use. In the case of *Morgan* v. *Devine*, 237 U. S. 632, 59 L. Ed. 1153, the contention was made that a conviction for a violation of Section 192, *supra*, would constitute a bar to a conviction for a violation of Section 190, where such larceny followed the burglarous entry. This Court, however held to the contrary and said in part:

> "We think it is manifest that Congress, in the enactment of these sections, intended to describe separate and distinct offenses, for in §190 it is made an offense to steal any mail bag or other property belonging to the Postoffice Department, irrespective of whether it was necessary, in order to reach the property, to forcibly break and enter into a postoffice building. The offense denounced by that section is complete when the property is stolen, if it belonged to the Postofflce Department, however the larceny be attempted. Section 192 makes it an offense to forcibly break into or attempt to break into a postoffice, with intent to commit in such postoffice a larceny or other depredation. This offense is compete when the postoffice is forcibly broken into, with intent to steal or commit other depredation. It describes an offense distinct and apart from the larceny or embezzlement which is defined and made punishable under § 190. If the forcible entry into the postoffice has been ac-

complished with the intent to commit the offenses as described, or any one of them, the crime is complete, although the intent to steal or commit depredation in the postoffice building may have been frustrated or abandoned without accomplishment. And so, under § 190, if the property is in fact stolen, it is immaterial how the postoffice was entered, whether by force or as a matter of right, or whether the building was entered at all. It being within the competency of Congress to say what shall be offenses against the law, we think the purpose was manifest in these sections to create two offenses. Notwithstanding there is a difference in the adjudicated cases upon this subject, we think the better doctrine recognizes that, although the transaction may be in a sense continuous, the offenses are separate, and each complete in itself."

In *People* v. *Simpson*, 66 Cal. App. 2d 319, 152 P. 2d 339, the court said in part:

"The further contention is made that appellant could not be convicted of the crime of robbery and also the crime of kidnapping for the purpose of robbery. Neither crime is necessarily included in the other. Each has elements of criminal action in addition to those which go to make up the other and, although they were committed in the course of a continuous series of acts, a conviction of both is not forbidden by constitutional immunity from double jeopardy. *People* v. *McIlvain*, 1942, 55 Cal. App. 2d 322, 130 P. 2d 131; *People* v. *Bruno*, 1934, 140 Cal. App. 460, 35 P. 2d 391."

In *People* v. *Cluchey* (Cal.), 298 P. 2d 633, the court said in part:

"Kidnaping for the purpose of robbery is a separate and distinct offense from the robbery. *People* v. *Beltran*, 93 Cal. App. 2d 704, 706, 209 P. 2d 635. Here there was a clear case of kidnaping for the pur-

pose of robbery. Defendant forced Spencer at gunpoint to drive around for several blocks until a convenient place for robbing him was found, where he ordered him to stop and the robbery took place. There were two separate and distinct offenses committed—the transportation or kidnaping for the obvious purpose of robbery and the robbery at the place where Spencer was ordered to stop. The judgment sentencing defendant for the two offenses did not constitute double punishment for one offense. Cf. *People* v. *Brown*, 29 Cal. 2d 555, 176 P. 2d 929."

In *Gilmore* v. *United States*, 124 F. 2d 537, the Circuit Court of Appeals for the Tenth Circuit said in part:

"Coming to the merits, it is contended that after appellant had been indicted, tried and found guilty in the former case of the crime of robbery of a national bank, he could not be prosecuted in this case under a separate indictment charging the killing of the officer in attempting to free himself and his associates from confinement; and that the trial, conviction and sentence in this case constitute double punishment for a single offense. The Fifth Amendment to the Constitution of the United States guarantees against double jeopardy for a single offense. But that guaranty is no impediment to the power of Congress to make separately punishable each step leading to the consummation of a transaction which lies within the reach of Congress to prohibit. *Albrecht* v. *United States*, 273 U. S. 1, 47 S. Ct. 250, 71 L. Ed. 505; *Reger* v. *Hudspeth*, 10 Cir., 103 L. Ed. 825, certiorari denied 308 U. S. 549, 60 S. Ct. 79, 84 L. Ed. 462. Two or more offenses may be separate and distinct in law despite the fact that they grow out of the same transaction, if each embraces one or more elements different from the others. *Slade* v. *United States*, 10 Cir., 85 F. 2d 786. And the test to be applied in determining the question of identity of offenses charged in two or more counts of a single indictment or in

separate indictments is whether each necessitates proof of fact not required of the others. *Blockburger* v. *United States*, 284 U. S. 299, 52 S. Ct. 180, 76 L. Ed. 306; *Mills* v. *Aderhold*, 10 Cir., 110 F. 2d 765; *Hunt* v. *Hudspeth*, 10 Cir., 111 F. 2d 42; *Carpenter* v. *Hudspeth*, 10 Cir., 112 F. 2d 126, certiorari denied 311 U. S. 682, 61 S. Ct. 62, 85 L. Ed. 440; *Caballero* v. *Hudspeth*, 10 Cir., 114 F. 2d 545."

In *Burns* v. *State*, 72 Okl. Cr. 432, 117 P. 2d 155, the contention was made that the conspiracy merged in the commission of the crimes which were the object and purpose of the conspiracy. The court held the contrary. In the first and second paragraphs of the syllabus the court said:

"1. The crime of conspiracy does not merge in the felonies described as overt acts in the indictment, where the conspiracy is a crime and not an essential part of the felonies to accomplish which the conspiracy was formed.

"2. A conspiracy to commit a felony constitutes an independent crime, complete in itself and distinct from the felony contemplated."

In the body of the opinion the court said in part:

"The general rule which has been adopted in the states which have had occasion to discuss this question, and the one which we think is in accordance with sound public policy and which will promote the ends of justice and be conducive to the efficient enforcement of the criminal law, is as stated in the case of *People* v. *Tavormina*, 257 N. Y. 84, 177 N. E. 317, A. L. R. 1405, in which it is stated:

"'The crime of conspiracy does not merge in the felonies described as overt acts in the indictment, where the conspiracy is a crime and

not an essential part of the felonies to accomplish which it was entered into.

"'A conspiracy to commit a felony constitutes an independent crime, complete in itself and distinct from the felony contemplated.

"'The fact that indictment for conspiracy alleges overt acts constituting a felony, or that the evidence discloses that the conspiracy was executed by the commission of a felony, does not render the indictment demurrable or prevent a conviction for conspiracy.'

"There is a lengthy annotation at the conclusion of this case in which authorities are cited from many jurisdictions sustaining this view. 75 A.L.R., *supra*."

In 15 Am. Jur., Criminal Law, § 390, page 65, the general rule is stated as follows:

"A putting in jeopardy for one act is no bar to a prosecution for a separate and distinct act merely because they are so closely connected in point of time that it is impossible to separate the evidence relating to them on the trial for the one of them first had. Consequently, a plea of former jeopardy will not be sustained where it appears that in one transaction two distinct crimes were committed."

In 31 Am. Jur., Kidnapping, § 19, page 359, the general rule with reference to kidnapping cases is stated as follows:

"The question of double jeopardy has been raised in jurisdictions where the separate offense of kidnapping may be committed although the purpose of the taking and detention is to commit another offense. The general principle stated elsewhere in the work is that prosecutions for separate offenses based upon the same transaction do not involve double jeopardy

where there are distinct elements in one offense which are not included in the other. Accordingly, the rule is that a prosecution for one of the separate offenses of rape and kidnapping or robbery and kidnapping based upon the same event is not barred by the prior prosecution for the other offense under the doctrine of double jeopardy which forbids a person from being twice put in jeopardy of life or liberty for the same offense."

In *Collins* v. *State*, 70 Okl. Cr. 340, 106 P. 2d 273, the court held that "a putting in jeopardy for one offense is no bar to a prosecution for a separate and distinct act merely because the two offenses are so closely connected that it is impossible to separate the evidence relating to them on the trial for the one of them first had."

In *Fall* v. *United States*, 49 F. 2d 506, the Court held that an acquittal on a charge of conspiracy to defraud the United States would not constitute *res judicata* in subsequent prosecution for bribery based on substantially the same facts.

In *Poffenbarger* v. *Aderhold*, 67 F. 2d 250, the court held that a conviction for stealing mail bags did not preclude a later conviction for taking mail from the bags.

The term "double punishment" is coupled in petitioner's brief with that of "double jeopardy." In the case of *Donato* v. *United States*, 48 F. 2d 142, the Circuit Court of Appeals for the Third Circuit said in part:

"The appellant argues that he gave a bond at the time of the final decree entered in the padlock proceedings for the express purpose of settling the punish-

ment which would be imposed on him in the event that he should violate the terms of the decree; and consequently the contempt proceedings were an attempt to subject him to double jeopardy. This contention is unsound; for the reason that the facts in this case do not constitute double jeopardy as defined by the cases. The constitutional prohibition is not against double punishment, but against being 'twice put in jeopardy,' double trial. *Bens* v. *United States*, 266 F. 152, 159 (C. C. A. 2); *United States* v. *One Buick Coach Automobile* (D. C.), 34 F. 2d 318, 321; *United States* v. *Ball*, 163 U. S. 662, 669, 16 S. Ct. 1192, 41 L. Ed. 300."

It is further contended that the petitioner was denied due process in that the trial court admitted "improper statements" in aggravation of the punishment. In connection with this statement counsel contends that the Oklahoma Criminal Court of Appeals misconstrued certain State statutes. This certainly was a matter for the Criminal Court of Appeals to settle and does not concern this Court. Moreover, it appears from the transcript (pages 23 to 29) that at the discussion with the petitioner and with counsel on both sides, the court inquired of petitioner as to whether or not the statements which had been made by the county attorney were correct and in response the petitioner confirmed all of such statements as true and further stated that he did not have anything further to say on his behalf, and even here counsel does not contend or suggest that the statements to which he objects were other than true statements of the facts involved.

It is further contended that (page 39 of the brief):

"Due process has been denied in that the punishment assessed against petitioner is wholly unreasonable and disproportionate to the kidnapping in this case."

This contention is hardly worth discussing. The matter is one for decision by the Oklahoma courts and many cases can be cited in which such a penalty has been imposed. Such penalty may be imposed under the statutes of Oklahoma in cases of rape, robbery and kidnapping, as well as murder.

In California the legislature amended their statute on kidnapping so as to provide for the death penalty in case the person kidnapped suffered bodily harm. In *People* v. *Tanner et al.* (Cal.), 44 P. 2d 324, defendants were charged with kidnapping and robbery by means of deadly weapons. They were convicted and sentenced to death. The sentences were affirmed on appeal. It did not appear that anyone was killed in connection with the commission of the crime.

In *People* v. *Brown* (Cal.), 176 P. 2d 929, defendant was convicted of robbery on two counts of rape and of kidnapping for purpose of robbery and a death sentence was imposed. The conviction was affirmed. The court said in part:

"Section 209 as amended in 1933 provides:

"'Every person who seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away

any individual by any means whatsoever with intent to hold or detain, or who holds or detains, such individual for ransom, reward or to commit extortion or robbery or to exact from relatives or friends of such person any money or valuable thing, or who aids or abets any such act, is guilty of a felony and upon conviction thereof shall suffer death or shall be punished by imprisonment in the State prison for life without possibility of parole, at the discretion of the jury trying the same, in cases in which the person or persons subjected to such kidnaping suffers or suffer bodily harm or shall be punished by imprisonment in the State prison for life with possibility of parole in cases where such person or persons do not suffer bodily harm.'

"This section makes it unnecessary to determine whether the kidnaper intended to commit extortion or robbery at the time of the original seizure or carrying-away. It is sufficient if the extortion or robbery was committed during the course of the abduction. Thus, whatever may have been the original motive of the kidnaping, if the kidnaper commits extortion or robbery during the kidnaping, he 'holds or detains' his victim 'to commit extortion or robbery' within the meaning of section 209."

If the contention of counsel were sound, then the second offense statutes of Oklahoma and the other states should be held unconstitutional and yet they have been sustained. Under such statutes, the defendant is not prosecuted subsequently because of the prior conviction, but such conviction is taken into consideration in fixing the punishment for the subsequent offense.

It is further interesting to note that the Federal Statute relating to kidnapping authorizes the imposition of the death penalty in cases of bodily harm, even though

no one has been killed. Yet this statute has been upheld by this Court.

Gooch v. *United States*, 297 U. S. 124, 80 L. Ed. 528;

Robinson v. *United States*, 324 U. S. 282, 89 L. Ed. 944.

Respectfully submitted,

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JANUARY, 1959.

Thereafter, in answer to a question from the Chief Justice, Mr. Goldberg continued:

> "* * * The State question left open concerns the notice of election. These districts cannot enter into contracts of this sort with the United States without having a vote on their elections. And the notices of election were attacked as being defective and the California court says we will not pass on this attack on the notices of election because we are going to reverse the case. They are going to have to go back to new contracts anyhow, and it is not necessary for us to determine that question. If this Court in turn reverses that opinion, it will be necessary for the California Court to determine the problem of election."[2]

The Court's treatment of the matter. The Court's opinion (p. 22)[3] discusses the claimed reasonableness of omitting from the contracts any statement of the capital component chargeable to the districts. It likewise considers (pp. 20-21) the highly controversial proposition that lands, taxed but denied delivery of water from the project, will indirectly benefit therefrom. In the latter connection, the Court evidently overlooked the express finding of the trial court, in No. 124, that there is "no evidence" to support a finding that the Albonicos' lands in excess of 320 acres "would be benefited by the operations of the Madera Irrigation District" In the light of this finding, the trial court, as stated above, ordered as one alternative that such lands be excluded from the District. (R. 412; Appellees' brief, p. 79.) In any event, the Court's opinion does not appear to discuss

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2. The quoted passages are from pages 29, 30 of the Transcript of Oral Argument, jointly arranged for by appellants and appellees. Subsequently, Mr. Rockwell, for appellees, pointed out, page 96, that in all four cases there were state questions left unanswered.

3. All citations of the Court's opinion are paged to the pamphlet print.

these matters in the context of state law and makes no reference to Section 23223 or any other provision of California law.

However, the opinion at one point declares (p. 3):

> "On the merits, we deem the contracts controlled by federal law and valid as against the objections made."

Moreover, the opinion concludes with the notation that the judgments below are *"Reversed"*, and contains no statement that the cases are remanded to the Supreme Court of California for decision of the remaining state issues. This is contrary to the practice of this Court in, for example, *Standard Oil Co. v. Johnson*, 316 U.S. 481, 485, and *San Diego Unions v. Garmon*, 353 U.S. 26, 29.

In the absence of any further indication from this Court as to its intentions, appellees will have no recourse other than to request the Supreme Court of California to proceed to determine whether the election notices in Nos. 122, 123 and 125 were valid under Section 23223 of the State Water Code; to decide whether, if the Madera contract is valid, the lands of the Albonicos in excess of 320 acres should not be excluded from that District; and to resolve other questions of state law. It would appear, however, that the Court's intention in this regard should be clarified by it, in accordance with the orderly administration of justice and in fairness both to appellees and the California courts. See *Federal Trade Commission v. Carter Products*, 346 U.S. 327, wherein the court of appeals was required to amend its judgment setting aside an order of the Commission so as specifically to authorize the taking of further evidence and a new order by that agency.

We submit that rehearing should be granted on this point in order that the Court may reconsider the extent to which state law governs these proceedings. In any event, the deci-

In the Supreme Court of the United States

OCTOBER TERM, 1957

THE IVANHOE IRRIGATION DISTRICT, et al., *Plaintiffs and Appellants,* vs. ALL PARTIES AND PERSONS, etc., *Defendants and Appellees.*	No. 122
THE MADERA IRRIGATION DISTRICT, et al., *Plaintiffs and Appellants,* vs. ALL PARTIES AND PERSONS, etc., *Defendants and Appellees.*	No. 123
THE MADERA IRRIGATION DISTRICT, et al., *Defendants and Appellants,* vs. PHILLIP and JANE E. ALBONICO, *Plaintiffs and Appellees.*	No. 124
THE SANTA BARBARA COUNTY WATER AGENCY, et al., *Plaintiffs and Appellants,* vs. ALL PARTIES AND PERSONS, etc., *Defendants and Appellees.*	No. 125

On Appeal from the Supreme Court of the State of California

Petition for Rehearing and Clarification

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On Appeal from the Supreme Court of the State of California

Petition for Rehearing and Clarification

Pursuant to Rule 58(1) of the Rules of this Court, appellees respectfully petition for a rehearing and clarification of the Court's decisions and judgments in the above cases, entered June 23, 1958. By order of July 8, 1958, Mr. Justice Clark extended to and including August 7, 1958 the time for the filing of such petition.

As grounds for rehearing and clarification, appellees submit that (I.) the Court seemingly disposed of the cases in

a manner contrary to the position of all of the parties, and in disregard of an express concession made by appellants in appellees' favor both in brief and at oral argument, and (II.) the premises developed in the Court's single, consolidated opinion do not support the ultimate conclusions and decisions reached in any of the four cases.

SUMMARY STATEMENT OF GROUNDS FOR REHEARING AND CLARIFICATION

Both in brief and at oral argument the parties stated their mutual understanding that, even should appellants' views prevail, the cases would need to be remanded to the Supreme Court of California for decision of one or more state questions left unanswered. Appellants' concessions in this regard were properly explicit, both in brief and at oral argument. The Court's opinion, nevertheless, is unclear as to the disposition it intends. At one point the opinion seems to state that all issues are controlled and resolved by federal law.

In other cases, the Court has taken care expressly to leave open the state questions remaining for decision, and has required lower courts to correct their judgments in order expressly to permit further determinations. The Court should manifestly do no less in the present important litigation. This is the substance of our Point I.

Our second ground, Point II, is even more serious. These cases involve validation proceedings with respect to purported contracts between the United States and state irrigation districts which the latter lack authority to enter into under state law. If the Court has now undertaken by federal authority to validate such contracts, these decisions seemingly represent an unjustifiable extension of federal power in disparagement of both the legislative and judicial au-

thority of the states. In reversing the Supreme Court of California's holding that the contracts were invalid, the Court points to no federal enactment which *imposes the contracts,* and expressly disavows any intent to determine whether Congress could constitutionally do so.

The decisions of the 1930's which were considered by some as representing an extension of federal authority were decided largely under the commerce clause. The power to regulate commerce among the several states is, of course, specifically delegated to Congress by Article I, Section 8 of the Constitution. There is no doubt that, when constitutionally exercised, this is a regulatory and coercive power, which overrides any conflicting state enactment. Although close questions were presented, the Court's decisions that the power to regulate interstate commerce carries with it the power to regulate matters affecting such commerce provide a rational and understandable test.

In contrast, the present cases do not bring into play the the commerce power or any other specifically-enumerated regulatory power of Article I, Section 8; rather, involved here is the vague authority of the Congress to collect taxes and spend for the "general welfare" of the United States and, under Article IV, Section 3, to manage and dispose of property acquired as a part of such a program. Authority under these provisions, unless reasonably limited by the essential requirements of a federal system, could be vagrant and unconfined. For that reason, the Court heretofore has applied these provisions with the greatest circumspection. If under these grants of authority the central government could coerce and override the states, there would be little if anything left of a federal system. Aware of this, the Court has heretofore repeatedly stated that under these provisions the central government must respect state law.

The present decisions seem to break loose from these moorings, although the Court's opinion does not underscore the vast significance of the action taken. We believe this is a clear case for the granting of a rehearing.

DISCUSSION

I. Unanswered Questions of State Law Remain and Should Be Expressly Left Open for Final Decision by the Supreme Court of California.

The unanswered state question as to the validity of the election notices. Among the unanswered questions of state law which would appear to remain, we refer to the two which stand out most clearly. In the state courts, appellees contended that the notices of special election with respect to the contracts at issue, in omitting to state the maximum amounts to be payable to the United States for construction purposes and cost of water supply and acquisition of property, failed to comply with Section 23223 of the California Water Code.[1] This contention, which if valid would vitiate the purported contracts under state law, was made in Nos. 122, 123 and 125, and would likewise control No. 124, which involves the contract presented for confirmation in No. 123.

In Nos. 122 and 123, the trial courts held for appellees on this issue, determining that the election notices were invalid under the aforesaid Section 23223. (R. 118-120, 168—No. 122; R. 303-304, 305-306, 359-360, 372—No. 123.) The Supreme Court of California, having held the contracts

1. Section 23223 of the California Water Code provides:
"Notice of election: Contents. Notice of the election shall contain in addition to the information required in the case of ordinary bond elections *a statement of the maximum amount of money to be payable to the United States for construction purposes and cost of water supply and acquisition of property*, exclusive of penalties and interest, and a general statement of the property, if any, to be conveyed by the district pursuant to the contract." (Emphasis ours.)

invalid on other grounds, noted this issue in Nos. 122, 123 and 125 but left it *unanswered* as unnecessary to its decisions. (AJS 62—No. 122; AJS 153-154—No. 123; AJS 222—No. 125.)

The unanswered state question as to the exclusion of the Albonicos' "excess" land from the Madera Irrigation District. In No. 124, a proceeding for a writ of mandate, the trial court entered a judgment in the alternative, requiring either that the Albonicos' land in excess of 320 acres be supplied with water by the district or that the land be excluded therefrom. (R. 418-420.) The Supreme Court of California modified this judgment by striking the alternative under which the land might be excluded. This action the court took in view of its holding that the Albonicos' land in excess of 320 acres could not be denied a fair and ratable portion of the water to be distributed. (AJS 183.) If the contract involved in this case, with the Madera Irrigation District, is valid, so as to deny water to such land, the unanswered question is whether the Albonicos are not entitled under state law to have it excluded from the District.

The position of the parties before this Court. Appellees' brief pointed out that state questions remained unanswered which, even if appellants' views were to prevail, would require remand. (Appellees' brief, pp. 32, 44, 91.) The correctness of this statement was conceded by appellants in their reply brief at page 19. Further, at oral argument Mr. Goldberg, for appellants, correctly observed:

> "• • • Unfortunately, even if we succeed in obtaining a reversal, that does not necessarily mean the end of this litigation. There has been at least in the Ivanhoe and Madera cases, there has been a State ground left open which the California Court simply hasn't determined. So we can't say with any assurance what will happen to the cases if they are reversed."

sions of the Court should be clarified in order to assure that the state grounds above discussed remain open for ultimate determination by the Supreme Court of California.

II. The Reasoning of the Court's Opinion Does Not Support a Determination That the Contracts Are Valid.

The Court's opinion recognizes (pp. 3, 12, 14) that the court below held the contracts invalid upon its determination that various of their provisions were "contrary" to "California law". However, the opinion reasons that the court was in error in so applying state law. And this error, according to the opinion (pp. 3, 12, 14, 15-16), derived from the California court's mistaken interpretation of Section 8 of the Reclamation Act of 1902.[4]

For purposes of this petition, it may be assumed that the California court's interpretation of Section 8 was erroneous. We submit that, even on this assumption, it does not follow that the Supreme Court of California was wrong in applying state law. The critical deficiency of the opinion, we urge, is its failure to supply a causal relation between these two propositions. Granting that the court below (1) misunderstood Section 8, we maintain that it was nevertheless right (2) in applying state law, at least so far as the contractual powers of its irrigation districts are concerned.

Involved in these cases is the validity of purported con-

4. We respectfully deny that the Supreme Court of California was in error in interpreting Section 8 of the 1902 Act as reaffirming the integrity of state water law in the field of irrigation. We continue to maintain that Section 5 of the 1902 Act (acreage limitation) and Section 8 (integrity of state water law) can be reconciled when understood to mean that the Secretary of the Interior is directed to proceed in accordance with state law, and therefore to effectuate the acreage limitation only where consonant with state law. The Court's opinion, as we believe, has, at least within the context of these cases, effectively obliterated Section 8, contrary to more than a half century of irrigation law and in disregard of its numerous prior decisions, discussed in appellees' brief at pages 53-60, giving Section 8 the meaningful application it would appear to deserve.

tracts between the United States and state-created irrigation districts. As the opinion recognizes (pp. 1-2, 18-19), Congress deliberately elected to proceed by way of contract, invoking by way of constitutional support the spending power under the general welfare clause and the authority to manage and dispose of federal property. The Court's opinion does not deny the general proposition that a purported contract must be held invalid if one of the parties—here, the state-created irrigation district—lacks authority to enter into it under relevant state statutory and constitutional provisions. This proposition must be true, we submit, in the absence of any overriding federal regulatory power, constitutionally supported. We therefore begin with purported contracts invalid from the standpoint of state law and look for the federal power, if any exists, which has been exercised to vitalize them. It appears that the Court's opinion is no more successful than were the parties or the Solicitor General in finding any such federal authority.

(1) Control of a state's waters for irrigation purposes is constitutionally reserved to it, barring exercise of the commerce power or some other constitutional authority.[5] Section 8 of the Reclamation Act of 1902 was stressed by appellees as confirming the constitutional division of power between central government and state, and the intent of Congress to test the validity of contracts dealing with irrigation water by state law in so far as the authority of the contracting irrigation district was concerned. Obliterating Section 8 does not provide the missing federal statutory basis to authorize state irrigation districts to do what they could not otherwise do under state law. Nor does it endow

5. The cases supporting this proposition are collected in appellees' brief at pages 63-66. See, in particular, *Kansas v. Colorado*, 206 U.S. 46, 87-88, 92.

the Federal Government with a constitutional power over irrigation waters which it otherwise lacked.

(2) The opinion points to no federal statute purporting to create state irrigation districts or to authorize them to contract with the Federal Government. Congress, very clearly, has left these matters to state law and the opinion, in terms, does not suggest otherwise.

(3) As if to underscore this point (2 above), the opinion expressly disavows (p. 14) any intention of determining whether the federal power could be constitutionally invoked to prevent a state from denying authority to its water districts and agencies to contract with the United States.

(4) The opinion refers (p. 19), as "beyond challenge", to the power of the Federal Government "to impose reasonable conditions on the use of federal funds, federal property, and federal privileges."[6] But what is here involved is not the authority of the Federal Government "to impose" conditions, reasonable or otherwise, on the receipt of a benefit, but authority "to impose" the benefit itself, along with the conditions. That is, the opinion holds (p. 16) that Section 5 (acreage limitation) controls Section 8 (integrity of state water law) and requires the Secretary of the Interior to attach the acreage limitation as a condition in contracting with an irrigation district to deliver water to it. But it is a very different thing to say that any federal law does, or constitutionally could, force the irrigation district to enter into a contract in the first place, contrary to the law of the state which created and governs the district. The state, finding the conditions under which the benefit is

6. It may be noted that the cases cited by the Court in this connection do not involve any clash between the federal conditions and state law. At pages 67-74 of appellees' brief, numerous cases are cited for the proposition that in proceeding under the general welfare and property clauses, the Federal Government must respect state law.

offered unacceptable under its statutes and constitution, manifestly should be free to decline the benefit. In order to support a determination of validity, it would be necessary to hold that federal law does, and constitutionally can, "impose" the instant contracts. The Court's opinion contains no such assertion.

In summary, the Supreme Court of California held that the instant contracts, in failing to provide a permanent water right and in requiring discrimination against members of an irrigation district in the delivery of water, were contrary to the statutory law of California and could not have been authorized by the legislature under the state constitution. (AJS 58-59.) This Court's opinion refers the reader to no federal provision, statutory or constitutional, which validates contracts such as are here involved in defiance of state law as so declared. The Court's opinion, therefore, fails to supply a logical connection between its determination that the Supreme Court of California misconstrued Section 8 and its conclusion that state law was erroneously applied to test the validity of the contracts. There is no proferred basis for its statement (p. 3) that "the contracts" are "controlled by federal law and valid as against the objections made."[7]

7. We have in Points I and II, above, set forth the two grounds which would appear to justify a rehearing under the practice of the Court. If a rehearing is granted, there are other issues, such as the significance of the Act of July 2, 1956, which should be reexamined.

CONCLUSION

For these reasons, there should, in any event, be a clarification of the Court's decisions and judgments so as expressly to leave open further determination of state questions in the Supreme Court of California. The proper course, we submit, is the granting of a rehearing on all issues.

Respectfully submitted,

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Dated: August 1, 1958.

Certificate

The undersigned, one of the attorneys for appellees in these proceedings, hereby certifies that the foregoing petition for rehearing and clarification is presented in good faith and not for delay.

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